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CONTRACT ATTORNEYS COURSE DESKBOOK

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THE JUDGE ADVOCATE GENERAL'S SCHOOL

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Richard L. Huff

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He has overseen the development of the "Freedom of Information Act Guide & Privacy Act Overview," the Department of Justice's 1100-page treatise that is updated and distributed every other year to more than 22,000 recipients. He has also published several legal articles, including "A Preliminary Analysis of the Implementation of the Freedom of Information Reform Act."

Mr. Huff came to the Department of Justice in 1976 after serving seven years on active duty in the Army; during his last reserve assignment he was assigned to the Army Judge Advocate General's School where he taught FOIA and Privacy Act subjects to military graduate students. He is now a retired colonel in the Army Reserve.

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CHAPTER 19

CONTRACT CHANGES

I. INTRODUCTION. Following this instruction, the student will understand:

- A. How to analyze change issues arising in government contracts.
- B. How to make formal changes to government contracts.
- C. How to recognize constructive changes in government contracts, and to resolve constructive change issues.

II. FORMAL CONTRACT CHANGES.

- A. Types of Formal Changes.
 - 1. Administrative change. A unilateral written change that does not affect the substantive rights of the parties. FAR 43.101. Example: a change in paying office or a change in telephone number for an agency point of contact.
 - 2. Change order. A unilateral, written order, signed by the contracting officer, directing the contractor to make a change that a Changes Clause authorizes, with or without the contractor's consent. FAR 43.103 and FAR 43.201. The contractor has no right to receive a change order because the Changes Clause vests to power to make such changes solely in the government.
 - 3. Bilateral modification (supplemental agreement). A contract modification signed by the contractor and the contracting officer. FAR 43.103(a). Bilateral modifications are used for:
 - a. Negotiating equitable adjustments that result from the issuance of a change order;

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- b. Definitizing a letter contract; and
- c. Reflecting other agreements of the parties affecting the terms of a contract.

B. Modifying a Contract.

1. Only contracting officers acting within the scope of their authority may execute contract modifications. FAR 43.102; Hensel Phelps Constr. Co., GSBICA Nos. 14744, 14877, 01-1 BCA ¶ 31,249; Daly Constr., Inc., ASBCA No. 34322, 92-1 BCA ¶ 24,469; Commercial Contractors, Inc., ASBCA No. 30675, 88-3 BCA ¶ 20,877.
2. Contracting officers shall ordinarily issue modifications on SF 30, Amendment of Solicitation/Modification of Contract. FAR 43.102; FAR 43.301; Staff, Inc., AGBICA Nos. 96-112-1, 96-159-1, 97-2 BCA ¶ 29,285 (oral modifications are unenforceable); Texas Instr., Inc. v. United States, 922 F.2d 810 (Fed. Cir. 1990); Daly Constr., Inc., ASBCA No. 34322, 92-1 BCA ¶ 24,469; but see Robinson Contracting Co. v. United States, 16 Cl. Ct. 676 (1989) (SF 30 **not** required). A copy of an SF30 is provided at Appendix D.
3. The contracting officer must price modifications before executing them if this can be done without adversely affecting the interests of the government. If the price cannot be negotiated prior to execution, negotiate a maximum price. FAR 43.102(b).
4. The contracting officer may order a change at any time prior to final payment. Final payment means payment in the full amount of the contract balance owed, received, and accepted by the contractor after delivery of supplies or the performance of services, with the understanding that no further payments are due. Design & Prod., Inc. v. United States, 18 Cl. Ct. 168 (1989); Gulf & Western Indus., Inc. v. United States, 6 Cl. Ct. 742 (1984).
5. Changes clause serves four major purposes:
 - a. Provides operating flexibility by giving the government the unilateral right to order contract changes to meet changes in government's needs.

b. Allows the contractor a method by which to propose contract changes to the government that may improve contract performance.

c. Provides the government with authority to unilaterally order contract changes within the general scope of the contract thereby avoiding the necessity to award a separate contract.

d. Provides the contractor with a method by which to file claims against the government for additional work. See, John Cibinic, Jr., Ralph C. Nash, Jr., and James F. Nagle, Administration of Government Contracts, 380-381 (4th ed. 2006) [hereinafter Administration of Gov't Contracts].

C. Prerequisites for Formal Changes.

1. The government must receive a benefit. G. Issaias & Co. (Kenya), ASBCA No. 30359, 88-1 BCA ¶ 20,441.
2. Proper funds must be available. FAR 43.105; DOD 7000.14-R, vol. 3, ch. 8, para. 080304.C-E; DFAS-IN Reg. 37-1, tbl. 8-7; AFI 65-601, vol. I, para. 6.3.7 and Figure 6.1.

III. CHANGES CLAUSE COVERAGE.

A. Purpose of the Clause.

B. Limitations.

1. The change must be of a type specified in the Changes clause (See Atchs to this outline A, B, and C).
 - a. The Changes clauses differ in the specific types of changes that they authorize.

- b. While the Supply Changes clause at FAR 52.243-1 permits in scope changes to drawings, designs, and specifications *only* when the supplies are “specially manufactured for the Government,” the Construction Changes clause at FAR 52.243-4(a) permits any in scope changes to the drawings, designs, and specifications.

- 2. The change must be within the general scope of the contract.¹

C. Scope Determinations.

- 1. Generally, the decision as to whether a particular modification is covered by the Changes Clause is resolved by determining whether the subject modification is “within the scope of the contract.” FAR 52.243-1 and 52.243-4. This phrase “within the scope of the contract” has been interpreted by the GAO, the BCAs, and the courts. Because the focus of the analysis differs slightly depending upon whether the case concerns a dispute between an incumbent contractor and the government or a competitor’s protest to the GAO,² the discussion below distinguishes these two types of cases.³

¹ Thus, in order for a contract change to be obligatory on a contractor, the change must meet both tests in that it must be: (1) of a type specified in the Changes clause and (2) within the general scope of the contract. See, Administration of Government Contracts, 381.

² While the “scope of the contract” test involving contract disputes is similar to the test involving protests, the focus is different. In a disputes case, the focus is on what the contractor should have anticipated to be within the scope of the contract; in contrast, in a protest case, the focus is on what a competitor should have anticipated to be within the scope of the competition. See, Administration of Gov’t Contracts, 386.

³ While litigation regarding whether a contract change is “within the scope” or “outside the scope” of the contract may occur as either a dispute or as a protest, few incumbent contractors contest that changes are “outside the scope” of the contract—so long as the government pays for the additional work. Most of the litigation in this area concerns: (1) an incumbent contractor arguing that the equitable adjustment it received for performance of an out of scope change was insufficient or (2) a competitor to the contract protests that a change was outside the scope of the original competition such that a new solicitation should have been issued. See, Administration of Gov’t Contracts, 381-382.

2. In a protest action, the test used by the GAO and the COFC is whether the change so materially altered the contract that the *field of competition* for the contract as modified would be significantly different from that obtained for the original contract (scope of competition). AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201, 1205 (Fed. Cir. 1993) (holding a modification falls within the scope of the original procurement if potential offerors would have reasonably anticipated such a change prior to initial award)⁴; Phoenix Air Group, Inc. v. U.S., 46 Fed. Cl. 90 (2000); Engineering & Professional Svcs., Inc., B-289331, 2002 U.S. Comp. Gen. LEXIS 11; L-3 Communications Aviation Recorders, B-281114, Dec. 28, 1998, 99-1 CPD ¶ 18; Hughes Space and Communications, Co., B276040, 97-1 CPD ¶ 158.

a. In Hughes Space and Communications, Co., B-276040, 97-1 CPD ¶ 158, the following factors were considered in determining whether the modification was within the scope of the contract:

- (1) The extent of any changes in the type of work or the performance period, or the difference in costs between the contract as awarded and as modified;
- (2) Whether the agency had historically procured the services under a separate contract; and
- (3) Whether potential offerors would have anticipated the modification.

b. GAO does not normally have jurisdiction to review a protest of a contract modifications—unless the modification is outside the scope of the contract. See, Hughes Space and Communications, Co. The GAO again addressed its jurisdiction to review outside the scope of the contract modifications in Poly-Pacific Technologies, B-296029, 2005 CPD P105.⁵

⁴ The case stated that the real issue in this protest is “whether Government modifications changed the contract enough to circumvent the statutory requirement of competition. . . This case asks whether the modification is within the scope of the competition conducted to achieve the original contract. . . A modification generally falls within the scope of the original procurement if potential bidders would have expected it to fall within the contract’s changes clause.” Id. At 1205.

⁵ In this case, the GAO stated that it will “generally not review modifications to [a] contract, because such matters are related to contract administration and are beyond the scope of our bid protest function.” Nevertheless, the GAO will review a protest of a contract modification if the protest alleges that the modification “changes the work from

3. In a contract dispute, the test used by courts and boards is whether the contract, as modified, “should be regarded as having been fairly and reasonably within the contemplation of the parties when the contract was entered into.” Freund v. United States, 260 U.S. 60 (1922); Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969); GAP Instrument Corp., ASBCA No. 51658, 01-1 BCA ¶ 31,358; Gassman Corp., ASBCA Nos. 44975, 44976, 00-1 BCA ¶ 30,720.
 - a. BCAs May Have Jurisdiction to Review Contract Modifications (whether “in-scope” or “outside scope”). The key to BCA jurisdiction under the Contract Disputes Act is whether the dispute “arises under” the contract per the Disputes Clause contained in the contract. FAR 33.215.
4. Why knowing whether a contract modification is “within the scope” or “outside the scope” of the contract is important:
 - a. For protests (to GAO): If GAO finds a contract modification is outside the scope of the contract, GAO may recommend that the government terminate the modification and then issue a solicitation for a separate contract requesting offerors for this work. Poly-Pacific Technologies.

the scope of the original contract” such that the work covered by the modification is subject to the requirements for competition under the Competition in Contracting Act. In this case, the GAO sustained the protest concerning an Air Force contract to provide plastics for use as an abrasive for the removal of coatings from aircraft. While the original contract required the contractor to “recycle” the used plastic consistent with EPA regulations, the protested contract modification allowed the contractor to choose to either recycle the used plastic or to “dispose” of it in lieu of recycling. GAO found that this modification was outside the scope of the original contract because there was a “material difference between the modified contract and contract that was originally awarded.” The GAO found two factors particularly significant: (1) the contract, as modified, reduced the cost of the contract (under the “disposal” option) by about 50% and (2) the contract, as modified, would have permitted at least four offerors to submit proposals. Id.

- b. For disputes (contract claims to BCAs or COFC): If the court or board finds a contract modification to be outside the scope of the contract (a.k.a. “cardinal change”): (1) contractor is *not required to perform* the work and (2) contractor may be entitled to “*breach damages*.” Cities Service Helix v. U.S., 211 Ct. Cl. 222 (1976) (stating that if the government contract modification results in a material breach, then the contractor may elect to either perform or not to perform). E. L. Hamm & Assocs., Inc., ASBCA No. 43792, 94-2 BCA ¶ 26,724 (holding that that because the Navy’s modification of a lease contract—which transformed the contract into a purchase contract—was beyond the scope of the contract, the contractor was entitled to “breach damages”). See also, Amertex Enter., Ltd. v. United States, 1997 U.S. App. LEXIS 3301 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998). Nevertheless, if the contractor elects to perform a contract modification, the contractor cannot later prevail on a contract claim for material breach of contract. Amertex Enter., Ltd. Once the contractor chooses to perform a modification, the contractor has, in fact, waived its material breach claim. Id.

D. Scope Determination Factors.

1. Changes in the Function of the Item or the Type of Work.

- a. In determining the materiality of a change, the most important factor to consider is the extent to which a product or service, as changed, differs from the requirements of the original contract. See E. L. Hamm & Assocs., Inc., ASBCA No. 43792, 94-2 BCA ¶ 26,724 (change from lease to lease/purchase was out-of-scope); Matter of: Makro Janitorial Servs., Inc., B-282690, Aug. 18, 1999, 99-2 CPD ¶ 39 (task order for housekeeping outside scope of an IDIQ contract for preventive maintenance); Hughes Space and Communications Co., B-276040, May 2, 1997, 97-1 CBD ¶ 158; Aragona Constr. Co. v. United States, 165 Ct. Cl. 382 (1964); 30 Comp Gen. 34 (B-95069)(1950)(stating that in a construction contract to build a hospital, modifying the contract to add another building to serve as living quarters for hospital employees was outside the scope of the contract).

- b. Substantial changes in the work may be in-scope if the parties entered into a broadly conceived contract. AT&T Communications, Inc. v. Wiltel, Inc., 1 F.3d 1201 (Fed. Cir. 1993) (more latitude allowed where the activity requires a state-of-the-art product); Engineering & Professional Svcs., Inc., B-289331, 2002 U.S. Comp. Gen. LEXIS 11 (provision of technologically advanced, ruggedized, handheld computers was not beyond the scope of the original contract that called for a wide array of hardware and software and RFP indicated the Engineering Change Proposal process would be utilized to implement technological advances); Paragon Sys., Inc., B-284694.2, 2000 CPD ¶ 114 (contract awarded for broad range of services given wide latitude when issuing a task order); Gen. Dynamics Corp. v. United States, 585 F.2d 457 (Ct. Cl. 1978).
- c. An agency's preaward statements that certain work was outside the scope of the contract can bind the agency if it later attempts to modify the contract to include the work. Octel Communications Corp. v. Gen. Servs. Admin., GSBICA No. 12975-P, 95-1 BCA ¶ 27,315.

2. Changes in Quantity.

- a. Increases and decreases in the quantity of major items or portions of the work are generally considered to be outside the scope of a contract. See, e.g., Valley Forge Flag Co., Inc., VABCA Nos. 4667, 5103, 97-2 BCA ¶ 29,246 (stating that in a requirements contract, a major increase in the total quantity of flags ordered was outside the scope of the contract); Liebert Corp., B-232234.5, Apr. 29, 1991, 91-1 CPD ¶ 413 (order in excess of maximum quantity was a material change). But see Master Security, Inc., B-274990, Jan. 14, 1997, 97-1 CPD ¶ 21 (tripling the number of work sites not out-of-scope change); Caltech Serv. Corp., B-240726.6, Jan. 22, 1992, 92-1 CPD ¶ 94 (increase in cargo tonnage on containerization requirements contract was within scope). Generally, increases are new procurements, and decreases are partial terminations for convenience. Cf. Lucas Aul, Inc., ASBCA No. 37803, 91-1 BCA ¶ 23,609 (order was deductive change, not partial termination).

- b. Generally, the Changes clause permits increases and decreases in the quantity of minor items or portions of the work unless the variation alters the entire bargain. See Symbolic Displays, Inc., B-182247, May 6, 1975, 75-1 CPD ¶ 278 (addition of strobe lights to aircraft manufacturing contract was not an “evident” out-of-scope change). Cf. Lucas Aul, Inc., ASBCA No. 37803, 91-1 BCA ¶ 23,609. See also Kentucky Bldg. Maint., Inc., ASBCA No. 50535, 98-2 BCA ¶ 29,846 (holding that agency clause that supplements the standard Changes clause was not illegal).

3. Number and Cost of Changes.

- a. Neither the number nor the cost of changes alone dictates whether modifications are beyond the scope of a contract. PCL Constr. Serv., Inc. v. United States, 47 Fed. Cl. 745 (2000) (series of contract modifications did not constitute cardinal change); Triax Co. v. United States, 28 Fed. Cl. 733 (1993); Reliance Ins. Co. v. United States, 20 Cl. Ct. 715 (1990), *aff’d*, 931 F.2d 863 (Fed. Cir. 1991) (over 200 changes still held to be within scope); Coates Indus. Piping, Inc., VABCA No. 5412, 99-2 BCA ¶ 30,479; Combined Arms Training Sys., Inc., ASBCA Nos. 44822, 47454, 96-2 BCA ¶ 28,617; Bruce-Andersen Co., ASBCA No. 35791, 89-2 BCA ¶ 21,871.
- b. However, the cumulative effect of a large number of changes is controlling. Air-A-Plane Corp. v. United States, 408 F.2d 1030 (Ct. Cl. 1969) (dispute involving over 1,000 changes sent back for trial on merits).

4. Changes in Time of Performance.

- a. The supply Changes clause does not authorize unilateral acceleration of performance. FAR 52.243-1 (found at Appendix A).
- b. Under the services Changes clause, the contracting officer unilaterally may change “when” a contractor is to perform but not the overall performance period. FAR 52.243-1, Alternate I (found at Appendix B).

- c. The construction Changes clause authorizes unilateral acceleration of performance. FAR 52.243-4(a)(4) (found at Appendix C).
- d. Granting a contractor additional time to perform will normally be considered within scope. Saratoga Indus., Inc., B-247141, 92-1 CPD ¶ 397.

5. Acceptance of a Change.

- a. If a contractor performs under a change order, it may not subsequently argue that the change constituted a breach of contract. Amerutex Enter., Ltd. v. United States, 1997 U.S. App. LEXIS 3301 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 1075 (1998); Silberblatt & Lasker, Inc. v. United States, 101 Ct. Cl. 54 (1944); C.E. Lowther & Son, ASBCA No. 26760, 85-2 BCA ¶ 18,149. Similarly, once the contractor waives the breach and performs, the Government is obligated to pay for the out-of-scope work. Mac-Well Co., ASBCA No. 23097, 79-2 BCA ¶ 13,895.
- b. Agreeing to a change does not convert an out-of-scope change into one that is within the scope of the contract for competition purposes; it simply means that the parties have agreed to process the change under the Changes clause. The contracting officer may not use modifications to avoid the statutory mandate for competition. Corbin Superior Composites, Inc., B-235019, July 20, 1989, 89-2 CPD ¶ 67.

E. The Duty to Continue Performance.

- 1. The Changes and Disputes (Standard) clause states that the contractor has a duty to continue performance pending the resolution of a dispute over an **in-scope change**. See FAR 52.233-1(i), Disputes (stating the “Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action *arising under the contract*, and comply with any decision of the Contracting Officer”). “Arising under the contract” refers to an in-scope change. See also FAR 52.243-1(e), Changes-Fixed Price; FAR 33.213.

2. Conversely, under the standard Disputes clause mentioned above, a contractor has no duty to proceed diligently with performance pending resolution of any dispute concerning a change **outside the scope** of the contract (“cardinal change”). FAR 52.233-1(i). Alliant Techsys., Inc. v. United States, 178 F.3d 1260 (Fed. Cir. 1999); CTA Inc., ASBCA No. 47062, 00-2 BCA ¶ 30,947; Airprep Tech., Inc. v. United States, 30 Fed. Cl. 488 (1994). Cities Service Helix v. U.S. (stating that if the government issues a modification that is outside the scope of the contract, then the contractor may elect not to perform the work covered by that modification).

3. Exceptions to the duty to proceed.
 - a. The government withholds progress payments improperly. Sterling Millwrights v. United States, 26 Cl. Ct. 49 (1992). But see D.W. Sandau Dredging, ENG BCA No. 5812, 96-1 BCA ¶ 28,064 (holding two late payments of 12 days and 19 days did not discharge the contractor from its duty to continue performance where contractor did not demonstrate the late payments had impacted its ability to perform).

 - b. Continued performance is impractical. United States v. Spearin, 248 U.S. 132 (1918) (government refused to provide safe working conditions); Xplo Corp., DOT BCA No. 1289, 86-3 BCA ¶ 19,125.

 - c. The government fails to provide clear direction to the contractor. James W. Sprayberry Constr., IBCA No. 2130, 87-1 BCA ¶ 19,645 (contractor justified to await clarification of defective specifications). Cf. Starghill Alternative Energy Corp., ASBCA Nos. 49612, 49732, 98-1 BCA ¶ 29,708 (a one-month Government delay in executing modification did not excuse contractor from proceeding).

4. The Alternate Disputes clause requires the contractor to continue to perform even if the government orders a cardinal change, or otherwise breaches the contract. See FAR 52.233-1, Alternate I. See also DFARS 233.215 (mandating use of this alternate clause under certain circumstances).

IV. OVERVIEW OF CONSTRUCTIVE CHANGES.

- A. What is a constructive change? A “constructive change” occurs when the government changes the work required under the contract, but the government fails to follow the procedures of the Changes clause. This theory also allows the government to compensate the contractor when the cost of the contract work increases due to a constructive change. If the contractor files a contract claim arguing that its costs have increased due to a constructive change, then it must prove the elements of this basis of recovery. Although less common, this theory also permits the government to decrease the contract price if the contract work is constructively changed, resulting in a decreased contract cost. The theory of constructive changes applies to construction, supply and services contracts. Administration of Government Contracts, 426-430.
- B. Elements of a Constructive Change. The Sherman R. Smoot Corp., ASBCA Nos. 52173, 53049, 01-1 BCA ¶ 31,252; Green’s Multi-Services, Inc., EBCA No. C-9611207, 97-1 BCA ¶ 28,649; Dan G. Trawick III, ASBCA No. 36260, 90-3 BCA ¶ 23,222. Note that these three elements listed below are generally applicable to all constructive change claims. Nevertheless, there are additional elements that the contractor must prove depending upon the “type” of constructive change alleged (i.e. contract misinterpretation, defective specifications, government interference/failure to cooperate, government failure to disclose vital information, or constructive acceleration) (see below for these additional elements).
1. A change occurred either as the result of government action or inaction. Kos Kam, Inc., ASBCA No. 34682, 92-1 BCA ¶ 24,546;
 2. The contractor did not perform voluntarily. Jowett, Inc., ASBCA No. 47364, 94-3 BCA ¶ 27,110; and
 3. The change resulted in an increase (or a decrease) in the cost or the time of performance. Advanced Mech. Servs., Inc., ASBCA No. 38832, 94-3 BCA ¶ 26,964.
- C. Types of Constructive Changes:
1. Contract misinterpretation by the government;
 2. Defective specifications;

3. Interference and failure to cooperate;
4. Failure to disclose vital information (superior knowledge); and
5. Constructive acceleration.

V. CONTRACT INTERPRETATION PRINCIPLES.

- A. Generally. This type of constructive change occurs when where the contractor and the government disagree on the work the contract specifications require. Ordinarily, in such a case, the government insists that the contractor perform the contract in a certain—usually more expensive—manner despite the contractor’s assertion that this manner is not required by the contract. Thus, the contractor argues in its constructive change claim that the government *misinterpreted* the contract’s requirements resulting in additional costs. Since a contractor has a general duty to perform in-scope contract changes, the contractor and government will learn at a much later date whether the government’s interpretation was, in fact, a constructive change or not—assuming the contractor files an appeal under the Contract Disputes Act. Administration of Government Contracts, 435.
- B. Main Issues. Ralph C. Nash, Jr., Government Contract Changes, 11-2 (2d ed. 1989).
 1. Did the government’s interpretation originate from an employee with authority? See J.F. Allen Co. & Wiley W. Jackson Co., a Joint Venture v. United States, 25 Cl. Ct. 312 (1992).
 2. Did the contractor perform work that the contract did not require?
 3. Did the contractor timely notify the government of the impact of the government’s interpretation?
- C. Contract Interpretation Process.
 1. A judge must interpret a contract when the parties do not agree on the meaning of its terms. Fruin-Colon Corp. v. United States, 912 F.2d 1426 (Fed. Cir. 1990).

2. Framework for analyzing contract interpretation issues.
 - a. Seek the original intent of the parties by examining:
 - (1) First, the language of the contract; (if cannot determine intent then look to (2) below)
 - (2) Second, the facts and circumstances surrounding contract formation and performance.
 - b. *If* this process of seeking the original intent of the parties (listed above in “a”) fails to reveal the objective intent of the parties, apply the two rules of risk allocation: contra proferentem and the duty to seek clarification.
3. The contractor must continue performance even if it does not agree with the contracting officer’s interpretation, absent a material (i.e. outside the scope of the contract) breach. See FAR 52.233-1, Disputes; Aero Prods. Co., ASBCA No. 44030, 93-2 BCA ¶ 25,868.

D. Intrinsic Evidence of Intent.

1. In determining the objective intent of the parties, first examine the terms of the contract. See, e.g., U.S. Eagle, Inc., ASBCA No. 41093, 92-1 BCA ¶ 24,371.
2. Interpret the contract as a whole. Coast Federal Bank, FSB v. United States, 02-5032, (Ct. App. Fed. Cir. Mar. 24, 2003); M.A. Mortenson Co. v. United States, 29 Fed. Cl. 82 (1993) (courts must give reasonable meaning to all parts of the contract and not render any portions of the contract meaningless); Hol-Gar Mfg. Corp. v. United States, 351 F.2d 972 (Ct. Cl. 1965); Bay Ship & Yacht Co., DOT BCA No. 2913, 96-1 BCA ¶ 28,236 (contract must be read as a whole, giving reasonable meaning to all its terms); Sheladia Constr. Corp., VABCA No. 3313, 91-3 BCA ¶ 24,111 (contractor may not ignore requirement merely because it is not stated in normal section of the specifications). Oakland Constr. Co., ASBCA No. 43986, 93-2 BCA ¶ 25,867 (prime contractor responsible for omission in bid caused by subcontractor’s failure to bid on contract requirement because subcontractors only received portion of specification from prime contractor).

- a. Give effect to all provisions and do not render meaningless any term of the contract. GPA-I, Ltd. P'ship. v. United States, 46 Fed. Cl. 762 (2000); B.D. Click Co. v. United States, 614 F.2d 748 (Ct. Cl. 1980); Jamsar, Inc. v. United States, 442 F.2d 930 (Ct. Cl. 1971); Rex Sys., Inc., ASBCA No. 45874, 94-1 BCA ¶ 26,370; Elec. Genie, Inc., ASBCA No. 40535, 93-1 BCA ¶ 25,307.
 - b. Interpret a contract in harmony with its principal purpose. Maddox Indus. Contractors, Inc., ASBCA No. 36091, 88-3 BCA ¶ 21,037; Restatement (Second) of Contracts § 203(a) (1981).
3. How to define terms.
- a. If contract defines a term, one may not substitute an alternate definition. Sears Petroleum & Transp. Corp., ASBCA No. 41401, 94-1 BCA ¶ 26,414.
 - b. Give ordinary terms their plain and ordinary meaning in defining the rights and obligations of the parties. T.E.C. Constr. v. VA Med. Ctr., 33 Fed. Cl. 363 (1995); Elden v. United States, 617 F.2d 254 (Ct. Cl. 1980); Alive & Well Int'l, Inc., ASBCA No. 51850, 00-1 BCA ¶ 30,778 (since contract left the term "discover" undefined, interpret in accordance with the ordinary meaning).
 - c. Give technical terms their technical meanings. Specialized or trade meanings take precedence over "lay" meanings. See Western States Constr. Co. v. United States, 26 Cl. Ct. 818 (1992).
 - (1) Give scientific and engineering terms their recognized technical meanings unless the context or an applicable usage indicates a contrary intention. American Mechanical, Inc., ASBCA No. 52033, 03-1 BCA ¶ 32,134; Tri-Cor, Inc. v. United States, 458 F.2d 112 (Ct. Cl. 1972); Coastal Drydock & Repair Corp., ASBCA No. 31894, 87-1 BCA ¶ 19,618.
 - (2) Similarly, give terms unique to government contracts their technical meanings. Gen. Builders Supply Co. v. United States, 409 F.2d 246 (Ct. Cl. 1969) (meaning of "equitable adjustment").

4. Lists of items.

- a. Lists are presumed exclusive unless qualified. J.A. Jones Constr. Co., ENG BCA No. 6164, 95-1 BCA ¶ 27,482; Santa Fe Engr's, Inc., ASBCA No. 48331, 95-1 BCA ¶ 27,505.
- b. Nonexclusive lists are presumed to include only similar, unspecified items. "Words, like men, are known by the company they keep. The meaning of a doubtful word may be ascertained by reference to the meaning of words with which they are associated." C.W. Roberts Constr. Co., ASBCA No. 12348, 68-1 BCA ¶ 6819. See also United States v. Turner Constr. Co., 819 F.2d 283 (Fed. Cir. 1987) (unreasonable to include unmentioned item in a list where unmentioned item was most expensive component).

5. Order of precedence.

- a. To resolve inconsistencies, order of precedence clauses establish priorities among different sections of the contract. See, e.g., FAR 52.214-29, Order of Precedence-Sealed Bidding; FAR 52.215-8, Order of Precedence – Uniform Contract Format; FAR 52.236-21, Specifications and Drawings for Construction.
- b. In construction contracts, a contractor may rely on the order of precedence clause to resolve a discrepancy between the specifications and drawings even if a discrepancy is patent or known to the contractor prior to bid submission. Hensel Phelps Constr. Co. v. United States, 886 F.2d 1296 (Fed. Cir. 1989); C Constr. Co., ASBCA No. 38098, 91-2 BCA ¶ 23,923; Hull-Hazard, Inc., ASBCA No. 34645, 90-3 BCA ¶ 23,173. See also Shah Constr. Co. Inc., ASBCA No. 50411, 01-1 BCA ¶ 31,330.
- c. Omissions. In construction contracts, the DFARS states that the contractor shall perform omitted details of work that are necessary to carry out the intent of the drawings and specifications or that are performed customarily. DFARS 252.236-7001; M.A. Mortenson Co., ASBCA No. 50383, 00-2 BCA ¶ 30,936 (holding that contractor should have known elevator would require rail support columns despite their omission from drawings); Single Ply Sys., Inc., ASBCA No. 42168, 91-2 BCA ¶ 24,032; Hull-Hazard, Inc., ASBCA No. 34645, 90-3 BCA ¶ 23,173.

- d. If the order of precedence clauses do not resolve the inconsistency, the common law rule is that a specific term takes precedence over a general term. Restatement (Second) of Contracts, § 203 (1981).

E. Extrinsic Evidence of Intent.

- 1. Do not consider extrinsic evidence if the contract terms are clear. See Coast Federal Bank, FSB v. United States, 02-5032, (Ct. App. Fed. Cir. Mar. 24, 2003); C. Sanchez & Son, Inc. v. United States, 24 Cl. Ct. 14 (1991), rev'd on other grounds, 6 F.3d 1539 (Fed. Cir. 1993); D&L Constr. Co., AGBCA No. 97-205-1, 00-1 BCA ¶ 31,001; Skyline Technical Constr. Servs., ASBCA No. 51076, 98-2 BCA ¶ 29,888 (since contract was clear, no extrinsic evidence allowed).
- 2. Preaward communications.
 - a. The Explanation to Prospective Offerors clause does not prevent parties from using clarifying statements by “authorized” officials to interpret an ambiguous provision. FAR 52.214-6 (sealed bidding); Max Drill, Inc. v. United States, 192 Ct. Cl. 608, 427 F.2d 1233 (1970); Turner Constr. Co. v. Gen. Servs. Admin., GSBICA No. 11361, 92-3 BCA ¶ 25,115 (contractor could not rely on preaward statement that was inconsistent with terms of solicitation); Community Heating & Plumbing Co., ASBCA No. 37981, 92-2 BCA ¶ 24,870.
 - b. Statements made at pre-bid conferences may bind the government. Cessna Aircraft Co., ASBCA No. 48118, 95-2 BCA ¶ 27,560; Gen. Atronics Corp., ASBCA No. 46784, 94-3 BCA ¶ 27,112. Cf. Orbas & Assoc., ASBCA No. 33359, 87-2 BCA ¶ 19,742 (contractor who did not attend pre-bid conference was not bound by explanation of provision where solicitation should have explained provision).
 - c. Preaward acceptance of contractor’s cost-cutting suggestion was binding on the government. See Pioneer Enters., Inc., ASBCA No. 43739, 93-1 BCA ¶ 25,395.

3. Actions during contract performance. The way in which the parties comport themselves often reveals the intent of the parties. Courts and boards afford these actions great weight when determining the meaning of a provision. Drytech, Inc., ASBCA No. 41152, 92-2 BCA ¶ 24,809; Macke Co. v. United States, 467 F.2d 1323 (Ct. Cl. 1972).

4. Prior course of dealing.
 - a. To determine the meaning of the current contract, consider a prior course of dealing between the parties in earlier contracts. Superstaff, Inc., ASBCA No. 46112, 94-1 BCA ¶ 26,574; American Transp. Line, Ltd., ASBCA No. 44510, 93-3 BCA ¶ 26,156; L.W. Foster Sportswear Co. v. United States, 405 F.2d 1285 (Ct. Cl. 1969).

 - b. The parties must be aware of the prior course of dealing. Gresham & Co. v. United States, 470 F.2d 542 (Ct. Cl. 1972); T. L. Roof & Assocs., ASBCA No. 38928; 93-2 BCA ¶ 25,895; Snowbird Indus., ASBCA No. 33027, 89-3 BCA ¶ 22,065.

 - c. Prior waivers of specifications must be numerous or consistent to vary an unambiguous term. Doyle Shirt Mfg. Corp., 462 F.2d 1150 (Ct. Cl. 1972); Cape Romain Contractors, Inc., ASBCA Nos. 50557, 52282, 00-1 BCA ¶ 30,697 (one waiver does not establish a course of dealing); Kvaas Constr. Co., ASBCA No. 45965, 94-1 BCA ¶ 26,513 (four waivers not enough); Gen. Sec. Servs. Corp. v. Gen. Servs. Admin., GSBGA No. 11381, 92-2 BCA ¶ 24,897 (no waiver based on waivers in six previous contracts because GSA sought to enforce requirement in current contract).

5. Custom or trade usage/industry standard.
 - a. Parties may not use custom and trade usage to contradict unambiguous terms. WRB Corp. v. United States, 183 Ct. Cl. 409, 436 (1968); C. Sanchez & Son, Inc. v. United States, 24 Cl. Ct. 14 (1991), rev'd on other grounds, 6 F.3d 1539 (Fed. Cir. 1993); All Star / SAB Pacific, J.V., ASBCA No. 50856, 99-1 BCA ¶ 30,214; Riley Stoker Corp., ASBCA No. 37019, 92-3 BCA ¶ 25,143 (contract terms were ambiguous); Harold Bailey Painting Co., ASBCA No. 27064, 87-1 BCA ¶ 19,601 (used to define "spot painting").

- b. Parties may resort to custom and trade usage to explain or define unambiguous terms. W.G. Cornell Co. v. United States, 376 F.2d 299 (Ct. Cl. 1967).
- c. Parties also may use an industry standard or trade usage to show that a term is ambiguous. See Metric Constr., Inc. v. Nat'l Aeronautics and Space Admin., 169 F.3d 747 (Fed. Cir. 1999) (contractor reasonably relied on trade practice and custom to show that the specifications were susceptible to different interpretations); Gholson, Byars, & Holmes Constr. Co. v. United States, 351 F.2d 987 (Ct. Cl. 1965); Western States Constr. Co. v. United States, 26 Cl. Ct. 818 (1992).
- d. The party asserting the industry standard or trade usage bears the burden of proving the existence of the standard or usage. Roxco, Ltd., ENG BCA No. 6435, 00-1 BCA ¶ 30,687; DWS, Inc., Debtor in Possession, ASBCA No. 29743, 93-1 BCA ¶ 25,404.

F. Allocation of Risk for Ambiguous Language.

If a contract is susceptible to more than one reasonable interpretation after application of the aforementioned rules, it contains an ambiguity. GPA-I, Ltd. P'ship. v. United States, 46 Fed. Cl. 762 (2000); Metric Constr., Inc. v. Nat'l Aeronautics and Space Admin., 169 F.3d 747 (Fed. Cir. 1999). It is then necessary to apply risk allocation principles to determine which party is ultimately responsible. The risk allocation principles do not apply to ambiguities in procurement regulations. Santa Fe Eng'rs, Inc. v. United States, 801 F.2d 379 (Fed. Cir. 1986).

- 1. Contra proferentem (means an ambiguous provision in a written document is construed against the person who selected the language). Peter Kiewit Sons' Co. v. United States, 109 Ct. Cl. 390 (1947).
 - a. If one cannot resolve an ambiguity under the contract interpretation rules, construe the ambiguity against the drafter. Emerald Maint., Inc., ASBCA No. 33153, 87-2 BCA ¶ 19,907; WPC Enter. v. United States, 323 F.2d 874 (Ct. Cl. 1963).

- b. “[Contra proferentem] puts the risk of ambiguity, lack of clarity, and absence of proper warning on the drafting party which could have forestalled the controversy; it pushes the drafters toward improving contractual forms; and it saves contractors from hidden traps not of their own making.” Sturm v. United States, 421 F.2d 723 (Ct. Cl. 1970).
- c. Elements of the rule.
 - (1) To recover, the contractor’s interpretation must be reasonable. Teague Bros. Transfer & Storage Co., Inc., ENG BCA Nos. 6312, 6313, 98-1 BCA ¶ 29,333 (the board decided that the contractor’s interpretation of the latent ambiguity was reasonable); J.C.N. Constr. Co., ASBCA No. 42263, 91-3 BCA ¶ 24,095 (contractor interpretation unreasonable);
 - (2) The opposing party must be the drafter. This is usually the government, but a contractor may also be the drafter. See Canadian Commercial Corp. v. United States, 202 Ct. Cl. 65 (1973); TRW, Inc., ASBCA No. 27299, 87-3 BCA ¶ 19,964; Prince George Ctr., Inc. v. Gen. Servs. Admin., GSBCA No. 12289, 94-2 BCA ¶ 26,889; and
 - (3) The non-drafting party must have detrimentally relied on its interpretation in submitting its bid. Fruin-Colon Corp. v. United States, 912 F.2d 1426 (Fed. Cir. 1990); National Med. Staffing, Inc., ASBCA No. 45046, 96-2 BCA ¶ 28,483 (for contra proferentem to apply, the contractor must demonstrate that it relied upon the interpretation in submitting its bid, not merely that it relied during performance); Food Servs., Inc., ASBCA No. 46176, 95-2 BCA ¶ 27,892.

2. Duty to seek clarification.

- a. Do not apply contra proferentem if an ambiguity is patent and the contractor failed to seek clarification. See Triax Pacific, Inc. v. West, 130 F.3d 1469 (Fed. Cir. 1997) (holding that contractor should have recognized the patent ambiguity and sought clarification before submitting its bid).

- b. An ambiguity is patent if it would have been apparent to a reasonable person in the claimant's position or if the provisions conflict on their face. See White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002) (holding that a note disclaiming the government's warranty on one of several dozen design drawings was patent); Hensel Phelps Constr. Co., ASBCA No. 49716, 00-2 BCA ¶ 30,925 (holding that an objective standard applied to the latent/patent ambiguity determination); Technical Sys. Assoc., Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684; Gaston & Assocs., Inc. v. United States, 27 Fed. Cl. 243 (1993) (latent ambiguity); Foothill Eng'g., IBCA No. 3119-A, 94-2 BCA ¶ 26,732 (the misplacement of a comma in a figure was a latent ambiguity and did not trigger a duty to inquire, because it was not obvious and apparent in the context of a reasonable, but busy, bidder). See also Pascal & Ludwig Eng'r, ENG BCA No. 6377, 99-1 BCA ¶ 30,135 (indicating that the ratio of the dollar amount at issue due to the ambiguity versus the contract price is a persuasive factor in determining whether the ambiguity is patent).

VI. DEFECTIVE SPECIFICATIONS - OVERVIEW.

- A. Theories of Recovery. Courts and boards hold the government liable for defects in specifications based upon:
 - 1. The implied warranty the government gives for the use of design specifications in a contract.
 - 2. The principles of impracticability/impossibility of performance when the contractor incurs increased costs while attempting to conform to defective performance specifications.
- B. Causation. This type of constructive change is deemed to have occurred at the time of contract award on the premise that the contracting officer had an immediate duty to issue an order correcting the defective specifications.

VII. DEFECTIVE SPECIFICATIONS - IMPLIED WARRANTY OF SPECIFICATIONS.

- A. Basis for the Implied Warranty.

1. This “warranty” is based on an implied promise by the government that a contractor can follow the contract drawings and specifications and perform without undue expense. This promise has been called a warranty; however, recovery is based on a breach of the duty to provide drawings and specifications reasonably free from defects. White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002); Fru-Con Constr. Corp. v. United States, 42 Fed. Cl. 94 (1998); United States v. Spearin, 248 U.S. 132 (1918); Luria Bros. & Co. v. United States, 177 Ct. Cl. 676, 369 F.2d 701 (1966).
 2. Defective specifications constitute constructive changes. See, e.g., Hol-Gar Mfg. Corp. v. United States, 175 Ct. Cl. 518, 360 F.2d 634 (1964). In some cases, judges have relied on a breach of contract theory. See, e.g., Big Chief Drilling Co. v. United States, 26 Cl. Ct. 1276 (1992).
- B. Specification Types. Aleutian Constr. v. United States, 24 Cl. Ct. 372 (1991); Monitor Plastics Co., ASBCA No. 14447, 72-2 BCA ¶ 9626.
1. **DESIGN SPECIFICATIONS** set forth precise measurements, tolerances, materials, tests, quality control, inspection requirements, and other specific information. See Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Q.R. Sys. North, Inc., ASBCA No. 39618, 92-2 BCA ¶ 24,793 (specified roofing material inadequate for roof type).
 2. **PERFORMANCE SPECIFICATIONS** set forth the operational characteristics desired for the item. In such specifications, design, measurements, and other specific details are neither stated nor considered important as long as the performance requirement is met. See Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Interwest Constr. v. Brown, 29 F.3d 611 (Fed. Cir. 1994).
 3. **PURCHASE DESCRIPTIONS** are specifications that designate a particular manufacturer’s model, part number, or product. The phrase “or equal” may accompany a purchase description. M.A. Mortenson Co., ASBCA Nos. 50716, 51241, 51257, 99-1 BCA ¶ 30,270.
 4. **COMPOSITE SPECIFICATIONS** are specifications that are comprised of two or more different specification types. See Defense Sys. Co., Inc., ASBCA No. 50918, 00-2 BCA ¶ 30,991; Transtechonology, Corp., Space Ordnance Sys. Div. v. United States, 22 Cl. Ct. 349 (1990).

C. Scope of Government Liability.

1. The scope of government liability depends on the specification type. Lopez v. A.C. & S., Inc., 858 F.2d 712 (Fed. Cir. 1988); Morrison-Knudsen Co., ASBCA No. 32476, 90-3 BCA ¶ 23,208.
2. Design specifications.
 - a. The key issue is whether the government required the contractor to use detailed specifications. Geo-Con, Inc., ENG BCA No. 5749, 94-1 BCA ¶ 26,359. Nonconformity with design specifications result in reduction in contract price. Donat Gerg haustechnik, ASBCA Nos. 41197, 42001, 42821, 47456, 97-2 BCA ¶ 29,272.
 - b. The government is responsible for design and related omissions, errors, and deficiencies in the specifications and drawings. White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002); Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Neal & Co. v. United States, 19 Cl. Ct. 463 (1990) (defective design specifications found to cause bowing in wall); International Foods Retort Co., ASBCA No. 34954, 92-2 BCA ¶ 24,994 (bland chicken ala king). But see Hawaiian Bitumuls & Paving v. United States, 26 Cl. Ct. 1234 (1992) (contractor may vitiate warranty by participating in drafting and developing specifications).
3. Performance specifications.
 - a. If the government uses a performance specification, the contractor accepts general responsibility for the design, engineering, and achievement of the performance requirements. Apollo Sheet Metal, Inc., v. United States, 44 Fed. Cl. 210 (1999); Blake Constr. Co. v. United States, 987 F.2d 743 (Fed. Cir. 1993); Technical Sys. Assoc., Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684.
 - b. The contractor has discretion as to the details of the work, but the work is subject to the government's right of final inspection and approval or rejection. Kos Kam, Inc., ASBCA No. 34682, 92-1 BCA ¶ 24,546.

4. Purchase descriptions. Monitor Plastics Co., ASBCA No. 14447, 72-2 BCA ¶ 9626.

- a. If the contractor furnishes or uses in fabrication a specified brand name or an acceptable and approved substitute brand-name product, the responsibility for proper performance generally falls upon the government.
- b. The government's liability is conditioned upon the contractor's correct use of the product.
- c. If the contractor elects to manufacture an equal product, it must ensure that the product is equal to the brand name product.

5. Composite specifications.

- a. If the government uses a composite specification, the parties must examine each portion of the specification to determine which specification type caused the problem. This determination establishes the scope of the government's liability. Aleutian Constr. v. United States, 24 Cl. Ct. 372 (1991); Penguin Indus. v. United States, 530 F.2d 934 (Ct. Cl. 1976). Cf. Hardwick Bros. Co., v. United States, 36 Fed. Cl. 347 (Fed. Cl. 1996) (since mixed specifications were primarily performance-based, there is no warranty covering the specifications).
- b. The contractor must isolate the defective element of the design portion or demonstrate affirmatively that its performance did not cause the problem. Defense Sys. Co., Inc., ASBCA No. 50918, 00-2 BCA ¶ 30,991 (finding that contractor failed to demonstrate deficient fuses were due to deficient Government design rather than production problems).

D. Recovery under the Implied Warranty of Specifications. See Transtechology Corp., Space Ordnance Sys. Div. v. United States, 22 Cl. Ct. 349 (1990).

- 1. To recover under the implied warranty of specifications, the contractor must prove that:

- a. It reasonably relied upon the defective specifications and complied fully with them. Phoenix Control Sys., Inc. v. Babbitt, Secy. of the Interior, 1997 U.S. App. LEXIS 8085 (Fed. Cir. 1997); Al Johnson Constr. Co. v. United States, 854 F.2d 467 (Fed. Cir. 1988); Gulf & Western Precision Eng'g Co. v. United States, 543 F.2d 125 (Ct. Cl. 1976); Mega Constr. Co., 29 Fed. Cl. 396 (1993); Bart Assocs., Inc., EBCA No. C-9211144, 96-2 BCA ¶ 28,479; and
 - b. That the defective specifications caused increased costs. McElroy Mach. & Mfg. Co., Inc., ASBCA No. 46477, 99-1 BCA ¶ 30,185; Pioneer Enters., Inc., ASBCA No. 43739, 93-1 BCA ¶ 25,395 (contractor failed to demonstrate that defective specification caused its delay); Chaparral Indus., Inc., ASBCA No. 34396, 91-2 BCA ¶ 23,813, aff'd, 975 F.2d 870 (Fed. Cir. 1992).
2. The contractor cannot recover if it has actual or constructive knowledge of the defects prior to award. M.A. Mortenson Co., ASBCA Nos. 50716, 51241, 51257, 99-1 BCA ¶ 30,270; Centennial Contractors, Inc., ASBCA No. 46820, 94-1 BCA ¶ 26,511; L.W. Foster Sportswear Co. v. United States, 405 F.2d 1285 (Ct. Cl. 1969) (contractor had actual knowledge from prior contract). Generally, constructive knowledge is limited to patent errors because a contractor has no duty to conduct an independent investigation to determine whether the specifications are adequate. Jordan & Nobles Constr. Co., GSBCA No. 8349, 91-1 BCA ¶ 23,659; John C. Grimberg Co., ASBCA No. 32490, 88-1 BCA ¶ 20,346. Cf. Spiros Vasilatos Painting, ASBCA No. 35065, 88-2 BCA ¶ 20,558.
 3. A contractor may not recover if it decides unilaterally to perform work knowing that the specifications were defective. Ordnance Research, Inc. v. United States, 221 Ct. Cl. 641, 609 F.2d 462 (1979).
 4. A contractor may not recover if it fails to give timely notice that it was experiencing problems without assistance of the government. McElroy Mach. & Mfg. Co., Inc., ASBCA No. 46477, 99-1 BCA ¶ 30,185; JGB Enters., Inc., ASBCA No. 49493, 96-2 BCA ¶ 28,498.

5. The government may disclaim this warranty. See, e.g., Serv. Eng'g Co., ASBCA No. 40272, 92-3 BCA ¶ 25,106; Bethlehem Steel Corp., ASBCA No. 13341, 72-1 BCA ¶ 9186. The disclaimer must be obvious and unequivocal, however, in order to shift the risk to the contractor. White v. Edsall Constr. Co., Inc., 296 F.3d 1081 (2002) (holding that a small note disclaiming the government's warranty found on one of several dozen design drawings was hidden and not obvious).

VIII. DEFECTIVE SPECIFICATIONS - IMPRACTICABILITY/IMPOSSIBILITY OF PERFORMANCE.

Elements. American Mechanical, Inc., ASBCA No. 52033, 03-1 BCA ¶ 32,134; Oak Adec, Inc. v. United States, 24 Cl. Ct. 502 (1991); Reflectone, Inc., ASBCA No. 42363, 98-2 BCA ¶ 29,869; Gulf & Western Indus., Inc., ASBCA No. 21090, 87-2 BCA ¶ 19,881.

A. An unforeseen or unexpected occurrence.

1. A significant increase in work usually caused by unforeseen technological problems. Examine the following factors to determine whether a problem was unforeseen or unexpected:
 - a. The nature of the contract and specifications, i.e., whether they require performance beyond the state of the art;
 - b. The extent of the contractor's effort; and
 - c. The ability of other contractors to meet the specification requirements.
2. In some cases, a contractor must show that an extensive research and development effort was necessary to meet the specifications or that no competent contractor can meet the performance requirements. Hol-Gar Mfg. Corp. v. United States, 360 F.2d 634 (Ct. Cl. 1964); Reflectone, Inc., ASBCA No. 42363, 98-2 BCA ¶ 29,869 (contractor must show specifications "required performance beyond the state of the art" to demonstrate impossibility); Defense Sys. Corp. & Hi-Shear Tech. Corp., ASBCA No. 42939, 95-2 BCA ¶ 27,721.

- B. The contractor did not assume the risk of the unforeseen occurrence by agreement or custom. RNJ Interstate Corp. v. United States, 181 F.3d 1329 (Fed. Cir. 1999) (holding that doctrine of impossibility did not apply to a worksite fire since the contract placed the risk of loss on the contractor until acceptance by the government); Southern Dredging Co., ENG BCA No 5843, 92-2 BCA ¶ 24,886; Fulton Hauling Corp., PSBCA No. 2778, 92-2 BCA ¶ 24,886.
1. A contractor may assume the risk of the unforeseen effort by using its own specifications. See Bethlehem Corp. v. United States, 462 F.2d 1400 (Ct. Cl. 1972); Costal Indus. v. United States, 32 Fed. Cl. 368 (1994) (use of specification drafted, in part, by contractor's supplier held to be assumption of risk); Technical Sys. Assoc. Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684.
 2. By proposing to extend the state of the art, a contractor may assume the risk of impossible performance. See J.A. Maurer, Inc. v. United States, 485 F.2d 588 (Ct. Cl. 1973).
- C. Performance is commercially impracticable or impossible.
1. The contractor must show that the increased cost of performance is so much greater than anticipated that performance is commercially senseless. See Fulton Hauling Corp., PSBCA No. 2778, 92-2 BCA ¶ 24,886; Technical Sys. Assoc. Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684; McElroy Mach. & Mfg. Co., Inc., ASBCA No. 46477, 99-1 BCA ¶ 30,185. But see SMC Info. Sys., Inc. v. Gen. Servs. Admin., GSBCA No. 9371, 93-1 BCA ¶ 25,485 (the increased difficulty cannot be the result of poor workmanship).
 2. There is no universal standard for determining "commercial senselessness."
 - a. Courts and boards sometimes use a "willing buyer" test to determine whether the increased costs render performance commercially senseless. A showing of economic hardship on the contractor is insufficient to demonstrate "commercial senselessness." The contractor must show that there are no buyers willing to pay the increased cost of production plus a reasonable profit. Ralph C. Nash, Jr., Government Contract Changes, 13-37 to 13-39 (2d ed. 1989).

- b. Some decisions have stated that it must be “positively unjust” to hold the contractor liable for the increased costs. Raytheon Co., ASBCA Nos. 50166, 50987, 01-1 BCA ¶ 31,245 (57% increase insufficient); Weststates Transp. Inc., PSBCA No. 3764, 97-1 BCA ¶ 28,633; Gulf & Western Indus., Inc., ASBCA No. 21090, 87-2 BCA ¶ 19,881 (70% increase insufficient); HLI Lordship Indus., VABCA No. 1785, 86-3 BCA ¶ 19,182 (200% increase in gold prices insufficient). But see Xplo Corp., DOT BCA No. 1289, 86-3 BCA ¶ 19,125 (50% increase in costs was sufficient).

IX. INTERFERENCE AND FAILURE TO COOPERATE.

A. Theory of Recovery.

1. Contracting activities have an implied obligation to cooperate with their contractors and not to administer the contract in a manner that hinders, delays, or increases the cost of performance. Precision Pine & Timber, Inc. v. United States, 50 Fed. Cl. 35, 65-70 (2001) (holding that the Forest Service beached a timber sale contract by suspending the contractor’s logging operations when the Mexican spotted owl was listed as an endangered species instead of consulting with the Fish and Wildlife Service and developing a management plan as was required by the ESA); Coastal Gov’t Serv., Inc., ASBCA No. 50283, 01-1 BCA ¶ 31,353; R&B Bewachungsgesellschaft GmbH, ASBCA No. 42213, 91-3 BCA ¶ 24,310; C.M. Lowther, Jr., ASBCA No. 38407, 91-3 BCA ¶ 24,296. See also Restatement (Second) of Contracts, § 205 (1981).
2. Generally a contractor may not recover for “interference” that results from a sovereign act. See Hills Materials Co., ASBCA No. 42410, 92-1 BCA ¶ 24,636, rev’d sub nom., Hills Materials Co. v. Rice, 982 F.2d 514 (Fed. Cir. 1992); Orlando Helicopter Airways, Inc. v. Widnall, 51 F.3d 258 (Fed. Cir. 1995) (holding that a criminal investigation of the contractor was a noncompensable sovereign act); Henderson, Inc., DOT BCA No. 2423, 94-2 BCA ¶ 26,728 (limitation on dredging period created implied warranty); R&B Bewachungsgesellschaft GmbH, 91-3 BCA ¶ 24,310 (criminal investigators took action in government’s contractual capacity, not sovereign capacity). See also Hughes Communications Galaxy, Inc. v. United States, 998 F.2d 953 (Fed. Cir. 1993) (holding that the government may waive sovereign act defense); Oman-Fischbach Int’l, a Joint Venture, ASBCA No. 44195, 00-2 BCA ¶ 31,022 (actions of a separate sovereign were not compensable constructive changes).

B. Bases for Interference Claims.

1. Overzealous inspection of the contractor's work. Neal & Co., Inc. v. United States, 36 Fed. Cl. 600 (1996) ("nit-picking punch list" held to be overzealous inspection); WRB Corp. v. United States, 183 Ct. Cl. 409 (1968); Adams v. United States, 175 Ct. Cl. 288, 358 F.2d 986 (1966).
2. Incompetence of government personnel. Harvey C. Jones, Inc., IBCA No. 2070, 90-2 BCA ¶ 22,762.
3. Water seepage or flow caused by the government. See C.M. Lowther, Jr., ASBCA No. 38407, 91-3 BCA ¶ 24,296 (water from malfunctioning sump pump was interference); Caesar Constr., Inc., ASBCA No. 41059, 91-1 BCA ¶ 23,639 (government's failure to remove snow piles which resulted in water seepage constituted a breach of its implied duty not to impede the contractor's performance).
4. Disruptive criminal investigations conducted in the government's contractual capacity. R&B Bewachungsgesellschaft GmbH, 91-3 BCA ¶ 24,310.

C. Bases for Failure to Cooperate Claims. The government must cooperate with a contractor. See, e.g., Whittaker Elecs. Sys. v. Dalton, Secy. of the Navy, 124 F.3d 1443 (Fed. Cir. 1997); James Lowe, Inc., ASBCA No. 42026, 92-2 BCA ¶ 24,835; Mit-Con, Inc., ASBCA No. 42916, 92-1 CPD ¶ 24,539. Bases for claims include:

1. Failure to provide assistance necessary for efficient contractor performance. Chris Berg, Inc. v. United States, 197 Ct. Cl. 503, 455 F.2d 1037 (1972) (implied requirement); Durocher Dock & Dredge, Inc., ENG BCA No. 5768, 91-3 BCA ¶ 24,145 (failure to contest sheriff's stop work order was not failure to cooperate); Hudson Contracting, Inc., ASBCA No. 41023, 94-1 BCA ¶ 26,466; Packard Constr. Corp., ASBCA No. 46082, 94-1 BCA ¶ 26,577; Ingalls Shipbldg. Div., Litton Sys., Inc., ASBCA No. 17717, 76-1 BCA ¶ 11,851 (express requirement).

2. Failure to prevent interference by another contractor. Examine closely the good faith effort of the government to administer the other contract to reduce interference. Northrup Grumman Corp. v. United States, 47 Fed. Cl. 20 (2000); Stephenson Assocs., Inc., GSBCA No. 6573, 86-3 BCA ¶ 19,071.

3. Failure to provide access to the work site. Summit Contractors, Inc. v. United States, 23 Cl. Ct. 333 (1991) (absent specific warranty, site unavailability must be due to government's fault); Atherton Constr., Inc., ASBCA No. 48527, 00-2 BCA ¶ 30,968; R.W. Jones, IBCA No. 3656-96, 99-1 BCA ¶ 30,268; Old Dominion Sec., ASBCA No. 40062, 91-3 BCA ¶ 24,173, *recons. denied*, 92-1 BCA ¶ 24,374 (failure to grant security clearances); M.A. Santander Constr., Inc., ASBCA No. 35907, 91-3 BCA ¶ 24,050 (interference excused default); Reliance Enter., ASBCA No. 20808, 76-1 BCA ¶ 11,831.

4. Abuse of discretion in the approval process. When the contract makes the precise manner of performance subject to approval by the contracting officer, the duty of cooperation requires that the government approve the contractor's methods unless approval is detrimental to the government's interest. Ralph C. Nash, Jr., Government Contract Changes 12-7 (2d ed. 1989). Common bases for claims are:
 - a. Failure to approve substitute items or components that are equal in quality and performance to the contract requirements. Page Constr. Co., AGBCA No. 92-191-1, 93-3 BCA ¶ 26,060; Bruce-Anderson Co., ASBCA No. 29411, 88-3 BCA ¶ 21,135 (contracting officer gave no explanation for refusal).

 - b. Unjustified disapproval of shop drawings or failure to approve within a reasonable time. Vogt Bros. Mfg. Co. v. United States, 160 Ct. Cl. 687 (1963).

 - c. Improper failure to approve the substitution or use of a particular subcontractor. Lockheed Martin Tactical Aircraft Sys., ASBCA Nos. 49530, 50057, 00-1 BCA ¶ 30,852, *recon. denied*, 00-2 BCA ¶ 30,930; Manning Elec. & Repair Co. v. United States, 22 Cl. Ct. 240 (1991); Hoel-Steffen Constr. Co. v. United States, 231 Ct. Cl. 128, 684 F.2d 843 (1982); Liles Constr. Co. v. United States, 197 Ct. Cl. 164, 455 F.2d 527 (1972); Richerson Constr., Inc. v. Gen. Servs. Admin., GSBCA No. 11161, 93-1 BCA ¶ 25,239. Cf. FAR 52.236-5, Material and Workmanship.

X. FAILURE TO DISCLOSE VITAL INFORMATION (SUPERIOR KNOWLEDGE).

A. Theory.

1. Part of the government's duty to cooperate with the contractor and not to hinder or interfere with its performance is a duty to disclose vital information of which the contractor is ignorant. See Helene Curtis Indus. v. United States, 312 F.2d 774 (Ct. Cl. 1963); Miller Elevator Co. v. United States, 30 Fed. Cl. 662 (1994); Bradley Constr. Inc. v. United States, 30 Fed. Cl. 507 (1994); Maitland Bros., ENG BCA No. 5782, 94-1 BCA ¶ 26,473.
2. Nondisclosure is a change to the contract because the contracting activity should have disclosed the vital information at contract award. Raytheon Co., ASBCA No. 50166, 50987, 01-1 BCA ¶ 31,245.

B. Elements of the Implied Duty to Disclose Vital Information. Hercules, Inc. v. United States, 24 F.3d 188 (Fed. Cir. 1994), aff'd on other grounds, 116 S. Ct. 981 (1996); Technical Sys. Assoc. Inc., GSBCA Nos. 13277-COM, 14538-COM, 00-1 BCA ¶ 30,684.

1. The contractor undertakes to perform without vital knowledge of a fact that affects performance costs or duration. Shawn K. Christiansen d/b/a Island Wide Contracting, AGBCA No. 94-200-3, 95-1 BCA ¶ 27,758; Bradley Constr., Inc. v. United States, 30 Fed. Cl. 507 (1994) (information must have a direct bearing on the cost or duration of contract performance); Johnson & Son Erector Co., ASBCA No. 23689, 86-2 BCA ¶ 18,931 (amount of interference caused by the nondisclosure is a factor in determining whether the information is vital); Numax Elec., Inc., ASBCA No. 29080, 90-1 BCA ¶ 22,280 (government failed to disclose that all previous contractors had been unable to manufacture in accordance with the specifications); Riverport Indus., Inc., ASBCA No. 30888, 87-2 BCA ¶ 19,876 (government must disclose the history of a procurement if the information is necessary to successful performance).

2. The government was aware the contractor had no knowledge of and had no reason to obtain such information. Hardeman-Monier-Hutcherson v. United States, 198 Ct. Cl. 472, 458 F.2d 1364 (1972); Max Jordan Bauunternehmung v. United States, 10 Cl. Ct. 672 (1986), aff'd, 820 F.2d 1208 (Fed. Cir. 1987); GAF Corp. v. United States, 932 F.2d 947 (Fed. Cir. 1991) (government need not inquire into the knowledge of an experienced contractor).
3. The contract specification misled the contractor or did not put it on notice to inquire. Raytheon Co., ASBCA Nos. 50166, 50987, 01-1 BCA ¶ 31,245 (government-furnished technical data package and specifications implied no further development would be required, although government knew this was not possible); D.F.K. Enter., Inc. v. United States, 45 Fed. Cl. 280 (1999) (holding that incomplete and inaccurate weather data was an affirmative misrepresentation of job site conditions); Jack L. Olsen, Inc., AGBCA No. 87-345-1, 93-2 BCA ¶ 25,767 (information provided in solicitation excused contractor from further inquiry). There is no breach of the duty to disclose vital information if the government shows that the contractor knew or should have known of the information. H.N. Bailey & Assoc. v. United States, 449 F.2d 376 (Ct. Cl. 1971) (information was general industry knowledge); Benju Corp., ASBCA No. 43648, 97-2 BCA ¶ 29,274 (Government did not have to disclose readily available information); Metal Trades, Inc., ASBCA No. 41643, 91-2 BCA ¶ 23,982; Hydromar Corp. of Del. & Eastern Seaboard v. United States, 25 Cl. Ct. 555 (1992), aff'd, 980 F.2d 744 (Fed. Cir. 1992) (undisclosed information reasonably was available to the contractor); Maitland Bros. Co., ENG BCA No. 5782, 94-1 BCA ¶ 26,473 (information in public domain).
4. The government failed to provide the relevant information. P.J. Maffei Bldg. Wrecking Corp. v. United States, 732 F.2d 913 (Fed. Cir. 1984) (contractor failed to prove government had better information than already disclosed); Bethlehem Corp. v. United States, 462 F.2d 1400 (Ct. Cl. 1972) (knowledge by one government agency is not attributable to another government agency absent some meaningful connection between the agencies); Marine Indus. Northwest, Inc., ASBCA No. 51942, 01-1 BCA ¶ 31,201 (contractor failed to demonstrate that Government had superior knowledge).

XI. CONSTRUCTIVE ACCELERATION.

A. Theory of Recovery.

1. If a contractor encounters an excusable delay, it is entitled to an extension of the contract schedule.
2. Constructive acceleration occurs when the contracting officer refuses to recognize a new contract schedule and demands that the contractor complete performance within the original contract period.

B. Elements of Constructive Acceleration. Fru-Con Constr. Corp. v. United States, 43 Fed. Cl. 306 (1999); Atlantic Dry Dock Corp., ASBCA Nos. 42609, 42610, 42611, 42612, 42613, 42679, 42685, 42686, 44472, 98-2 BCA ¶ 30,025; Trepte Constr. Co., ASBCA No. 28555, 90-1 BCA ¶ 22,595.

1. The existence of one or more excusable delays;
2. Notice by the contractor to the government of such delay and a request for an extension of time;
3. Failure or refusal by the government to grant the extension request;
4. An express or implied order by the government to accelerate; and
5. Actual acceleration resulting in increased costs.

C. Actions That May Lead to Constructive Acceleration.

1. The government threatens to terminate when the contractor encounters an excusable delay. Intersea Research Corp., IBCA No. 1675, 85-2 BCA ¶ 18,058;
2. The government threatens to assess liquidated damages and refuses to grant a time extension. Norair Eng'g Corp. v. United States, 666 F.2d 546 (Ct. Cl. 1981); Unarco Material Handling, PSBCA No. 4100, 00-1 BCA ¶ 30,682; or

3. The government delays approval of a request for a time extension. Fishbach & Moore Int'l Corp., ASBCA No. 18146, 77-1 BCA ¶ 12,300, aff'd, 617 F.2d 223 (Ct. Cl. 1980). But see Franklin Pavlov Constr. Co., HUD BCA No. 93-C-13, 94-3 BCA ¶ 27,078 (mere denial of delay request due to lack of information not tantamount to government order to accelerate).

D. Measure of Damages.

1. The contractor's acceleration efforts need not be successful; a reasonable attempt to meet a completion date is sufficient. Unarco Material Handling, PSBCA No. 4100, 00-1 BCA ¶ 30,682; Fermont Div., Dynamics Corp., ASBCA No. 15806, 75-1 BCA ¶ 11,139.
2. The measure of recovery will be the difference between:
 - a. The reasonable costs attributable to acceleration or attempting to accelerate; and
 - b. The lesser costs the contractor reasonably would have incurred absent its acceleration efforts; plus
 - c. A reasonable profit on the above-described difference.
3. Common acceleration costs.
 - a. Increased labor costs;
 - b. Increased material cost due to expedited delivery; and
 - c. Loss of efficiency or productivity. A method to compute this cost is to compare the work accomplished per labor hour or dollar during an acceleration period with the work accomplished per labor hour or dollar during a normal period. See Ralph C. Nash, Jr., Government Contract Changes, 18-16 and 18-17 (2d ed. 1989).

XII. NOTICE REQUIREMENTS.

A. Notice of a Change by the Contractor.

1. Formal changes. The standard Changes clauses each state that “the Contractor must assert its right to an adjustment . . . within 30 days after receipt of a written [change] order.” Courts and boards, however, do not strictly construe this requirement unless the untimely notice is prejudicial to the government. Watson, Rice & Co., HUD BCA No. 89-4468-C8, 90-1 BCA ¶ 22,499; SOSA Y Barbera Constrs., S.A., ENG BCA No. PCC-57, 89-2 BCA ¶ 21,754; E.W. Jerdon, Inc., ASBCA No. 32957, 88-2 BCA ¶ 20,729.
2. Constructive Changes.
 - a. Supply / Service Contracts. The standard supply and service contract Changes clauses do not prescribe specific periods within which a contractor must seek an adjustment for a constructive change.
 - b. Construction Contracts. Under the Changes clause for construction contracts, a contractor must assert its right to an adjustment within 30 days of notifying the government that it considers a government action to be a constructive change. FAR 52.243-4(b) and (e). Furthermore, unless the contractor bases its adjustment on defective specifications, it may not recover costs incurred more than 20 days before notifying the government of a constructive change. FAR 52.243-4(d). But see Martin J. Simko Constr., Inc. v. United States, 11 Cl. Ct. 257 (1986) (government must show late notice was prejudicial).
 - c. Content of notice for constructive changes. A contractor must assert a positive, present intent to seek recovery as a matter of legal right. Written notice is not required, and there is no formal method for asserting an intent to recover. The notice, however, must be more than an ambiguous letter that evidences a differing opinion. Likewise, merely advising the contracting officer of problems is not sufficient notice. CTA Inc., ASBCA No. 47062, 00-2 BCA ¶ 30,947; McLamb Upholstery, Inc., ASBCA No. 42112, 91-3 BCA ¶ 24,081.

B. Request for an Equitable Adjustment.

1. Distinction Between Intent to Submit Adjustment and the Request for Adjustment. The actual request for an adjustment to the contract price or other delivery terms can be submitted at a later time. The above requirement for the contractor to assert its rights to an adjustment places the government on notice that there has been an actual or constructive change to the contract, thus permitting the government to possibly adjust its action/inaction.
2. Statute of Limitations.
 - a. For all contracts entered into subsequent to October 1, 1995, there is a six-year statute of limitations on claims against the government thus requiring the request for an equitable adjustment to be submitted within that time frame. See 41 U.S.C. § 605 and FAR 33.206.
 - b. For contracts awarded before October 1, 1995, the contractor's request for an equitable adjustment must be made within a reasonable time unless the contract specifies otherwise. Generally, this will require the contractor to act while the facts supporting the claim are readily available. See LaForge and Budd Construction Co. v. United States 48 Fed. Cl. 566 (2001) (finding *laches* did not bar a contractor's claim submitted seven years after its accrual because the government did not demonstrate it was prejudiced).
3. Effect of Final Payment.
 - a. Requests for equitable adjustments raised for the first time after final payment are untimely. Design & Prod., Inc. v. United States, 18 Cl. Ct. 168 (1989) (final payment rule predicated on express contractual provisions); Navales Enter., Inc., ASBCA No. 52202, 99-2 BCA ¶ 30,528; Electro-Technology Corp., ASBCA No. 42495, 93-2 BCA ¶ 25,750.

- b. Final payment does not bar claims for equitable adjustments that were pending or of which the government had constructive knowledge at the time of final payment. Gulf & Western Indus., Inc. v. United States, 6 Cl. Ct. 742 (1984); Navales Enter., Inc., ASBCA No. 52202, 99-2 BCA ¶ 30,528; David Grimaldi Co., ASBCA No. 36043, 89-1 BCA ¶ 21,341 (contractor must specifically assert a claim as a matter of right; letter merely presented arguments).

C. Notice by the Government.

- 1. The Changes clauses do not specify the time within which the government must claim a downward equitable adjustment. They also do not require the government to notify the contractor that it intends to subsequently assert its right to an adjustment.
- 2. For contracts awarded subsequent to October 1, 1995, the government must assert any claims it has against a contractor within six years from the accrual of the claim, except claims based upon fraud. See 41 U.S.C § 605 and FAR 33.206(b).
- 3. For contracts awarded both before and after October 1, 1995, the government's request for an equitable adjustment must be made within a reasonable time unless the contract specifies otherwise. Generally, this will require the government to act while the facts supporting the claim are readily available and before the contractor's position is prejudiced by final settlement with its subcontractors, suppliers, and other creditors. See Aero Union Corp. v. United States, 47 Fed. Cl. 677 (2000) (denying motion for summary judgment where there were issues of fact concerning whether the government had delayed so long the plaintiff was prejudiced by the delay).

XIII. ANALYZING CHANGES ISSUES.

- A. Determine whether the contract required work that differed from what was called for in the original contract. If not, then there was no "change" to the contract requirements, and a contract adjustment is unnecessary.

- B. If the government changed the contract requirements, determine whether the new work was within or outside the scope of the contract.
1. Within-scope change. The contractor may be entitled to relief pursuant to the Changes clause. FAR 52.243-1 (supplies); FAR 52.243-1, Alternate I (services); FAR 52.243-4 (construction). Under the basic equitable adjustment formula, the contractor is entitled to the difference between the reasonable costs of performing the work as changed and the reasonable costs of performing as originally required. See Chapter 21.
 2. Outside-the-scope change (cardinal change). The contractor's entitlement is measured under common law principles. In general, compensatory damages including a reliance component (costs incurred as a consequence of the breach) and an expectancy component (lost profits) are awarded, but consequential damages are not. See Chapter 21.
- C. If a change occurred, determine whether the government employee who ordered/caused the change had actual authority to order the change or whether the contractor can overcome the employee's lack of actual authority.
- D. If a change occurred, determine when the change occurred; when the contractor provided, or when the government can be charged with having acquired, notice of the change; and whether the contractor provided timely notice. Determine if untimely notice prejudiced the government.
- E. If a change occurred, determine the effect of the change on the costs incurred or saved by the contractor and on the time required for contract performance.

XIV. CONCLUSION.

APPENDIX A: CHANGES CLAUSE (SUPPLIES), FAR 52.243-1.

CHANGES--FIXED-PRICE (AUG 1987)

- (a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:
 - (1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.
 - (2) Method of shipment or packing.
 - (3) Place of delivery.
- (b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.
- (c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.
- (d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.
- (e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

APPENDIX B: CHANGES CLAUSE (SERVICES)
FAR 52.243-1, ALTERNATE I.

CHANGES--FIXED-PRICE (AUG 1987)

- (a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:
 - (1) Description of services to be performed.
 - (2) Time of performance (i.e., hours of the day, days of the week, etc.).
 - (3) Place of performance of the services.
- (b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.
- (c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.
- (d) If the Contractor's proposal includes the cost of property made obsolete or excess by the change, the Contracting Officer shall have the right to prescribe the manner of the disposition of the property.
- (e) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

APPENDIX C: CHANGES CLAUSE (CONSTRUCTION), FAR 52.243-4.

CHANGES (AUG 1987)

- (a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes--
 - (1) In the specifications (including drawings and designs);
 - (2) In the method or manner of performance of the work;
 - (3) In the Government-furnished facilities, equipment, materials, services, or site; or
 - (4) Directing acceleration in the performance of the work.
- (b) Any other written order or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; provided, that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the Contractor regards the order as a change order.
- (c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.
- (d) If any change under this clause causes an increase or decrease in the Contractor's costs of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) above shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with such defective specifications.
- (e) The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.
- (f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

Appendix D: Standard Form (SF) 30, Amendment of Solicitation/Modification of Contract

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT				1. CONTRACT ID CODE		PAGE OF PAGES	
2. AMENDMENT/MODIFICATION NO.		3. EFFECTIVE DATE		4. REQUISITION/PURCHASE REC. NO.		5. PROJECT NO. (if applicable)	
6. ISSUED BY		CODE		7. ADMINISTERED BY (if other than item 6)		CODE	
8. NAME AND ADDRESS OF CONTRACTOR (No., street, county, State and ZIP Code)				(X)			
				9A. AMENDMENT OF SOLICITATION NO.			
				9B. DATED (SEE ITEM 11)			
				10A. MODIFICATION OF CONTRACT/ORDER NO.			
				10B. DATED (SEE ITEM 11)			
CODE		FACILITY CODE					
11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS							
<input type="checkbox"/> The above numbered solicitation is amended as set forth in item 14. The hour and date specified for receipt of Offers <input type="checkbox"/> is extended. <input type="checkbox"/> is not extended. Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment your desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.							
12. ACCOUNTING AND APPROPRIATION DATA (if required)							
13. THIS ITEM ONLY APPLIES TO MODIFICATION OF CONTRACTS/ORDERS. IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.							
CHECK ONE		A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.					
		B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b).					
		C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF _____					
		D. OTHER (Specify type of modification and authority)					
E. IMPORTANT: Contractor <input type="checkbox"/> is not, <input type="checkbox"/> is required to sign this document and return _____ copies to the issuing office.							
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by DCF section headings, including solicitation/contract subject matter where feasible.)							
Except as provided herein, all terms and conditions of the document referenced in item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.							
15A. NAME AND TITLE OF SIGNER (Type or print)				15A. NAME AND TITLE OF CONTRACTING OFFICER (Type or print)			
15B. CONTRACTOR/OFFEROR		15C. DATE SIGNED		15B. UNITED STATES OF AMERICA		15C. DATE SIGNED	
_____ (Signature of person authorized to sign)				_____ (Signature of Contracting Officer)			

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Previous edition unusable

STANDARD FORM 30 (REV. 10-83)
Prescribed by GSA FPMR (48 CFR) 53.243

CHAPTER 20

PRICING OF ADJUSTMENTS

I. INTRODUCTION.

- A. The basic philosophy and prerequisites for pricing contract adjustments.
- B. A comprehensive methodology for quantum case analysis.
- C. The measurement, methods, and burden of proving price adjustments.
- D. The special items that often comprise a contractor's claim.

II. QUANTUM CASE PLANNING.

- A. The Philosophy.
 - 1. It is necessary to approach pricing of adjustments with a guiding philosophy. To do otherwise renders your litigation efforts half-hearted. The elements of quantum litigation planning are two-fold:
 - a. The fact that a contractor prevails on entitlement is meaningless in your quantum case.
 - b. Your game plan for the contractor's claim is a simple one: First you are going to cut it up, and then you are going to defeat it.
- B. The Prerequisites.
 - 1. There exist two essential prerequisites to your efforts.

MAJ Jennifer C. Santiago
157th Contract Attorneys' Course
March 2007

- a. You must have a thorough understanding of the law on pricing of adjustments.
 - b. Facts are king, and getting all the facts will take hard work.
- C. The Methodology: DAMS.
 - 1. Divide the contractor's claim into component parts.
 - 2. Apply Cost/Cost Accounting Standards (CAS) principles.
 - 3. Make the contractor prove the amount claimed.
 - 4. See what really happened.

III. APPLYING THE DAMS METHODOLOGY.

- A. Divide the Contractor's Claim into Component Parts.
 - 1. A contractor claim is really a series of smaller claims all added together. Each piece must stand on its own, in terms of being both legally permitted and factually supported.
 - 2. Quantum case litigation requires analyzing each section of the contractor's claim separately. This leads to a more thorough examination and prevents overpayment regardless if the case is settled or litigated.
- B. Apply Cost/CAS Principles.

1. Generally. The government does not pay all the costs actually incurred and/or claimed by a contractor. Applying Cost/CAS principles entails analyzing each part of the total claim for allowability, allocability, reasonableness, and CAS compliance.
2. Allowability. The government does not pay certain costs, even if they were actually incurred, reasonable in nature and amount, in furtherance of the particular contract, and properly accounted for. The contract itself, FAR Part 31, and case law all establish that certain actual costs are not allowable.

a. Profit.

- (1) A contractor is not always entitled to profit as part of its claim. In many instances, profit is expressly not allowable. The rationale for lack of profit is that there is no change in the underlying work and/or risk—only the period in which performance occurs.
- (2) Work stoppage adjustments. These adjustments preclude profit as part of the price increase. Contract clauses providing for such profit-less adjustments are:
 - (a) FAR 52.242-14, Suspension of Work. See Thomas J. Papathomas, ASBCA No. 51352, 99-1 BCA ¶ 30,349; Tom Shaw, Inc., ASBCA No. 28596, 95-1 BCA ¶ 27457.
 - (b) FAR 52.242-17, Government Delay of Work. NB: an unabsorbed overhead claim is essentially one for the indirect costs of a government-caused delay, and therefore, profit is also precluded. ECC Int'l Corp., ASBCA Nos. 45041 et. al, 94-2 BCA ¶ 26,639.

- (3) Labor standards adjustments. Adjustments under labor standards clauses include only the increased costs of direct labor (and preclude both profit and overhead). See FAR 52.222-43; FAR 52.222-44 (Fair Labor Standards Act and Service Contract Act); All Star/SAB Pacific, J.V., ASBCA No. 50856, 98-2 BCA ¶ 29,958; U.S. Contracting, Inc., ASBCA No. 49713, 97-2 BCA ¶ 29,232. But see BellSouth Communications Sys., Inc., ASBCA No. 45955, 94-3 BCA ¶ 27,231 (holding that a price adjustment under the Davis-Bacon Act (FAR 52.222-6) did not preclude profit).
- (4) Equitable adjustment. By contrast, for equitable adjustments a contractor is generally entitled to profit as part of its claim for additional performance costs. United States v. Callahan Walker Constr. Co., 317 U.S. 56 (1942). Equitable adjustments are based on contract clauses granting that remedy, including: FAR 52.243-1 thru -7 (Changes); FAR 52.245-2, -4, -5, and -7 (Government Furnished Property); FAR 52.248-1 thru -3 (Value Engineering); and FAR 52.236-2 (Differing Site Conditions).
- (5) Convenience Termination Settlements. A contractor is not entitled to profit as part of a termination for convenience settlement proposal if the contractor would have incurred a loss had the entire contract been completed. FAR 49.203. The government has the burden of proving that the contractor would have incurred a loss at contract completion. R&B Bewachungs, GmbH, ASBCA No. 42214, 92-3 BCA ¶ 25,105. A contractor is not entitled to anticipatory profits as part of a convenience termination settlement proposal. Dairy Sales Corp. v. United States, 593 F.2d 1002 (Ct. Cl. 1979).

b. Attorneys Fees.

- (1) Costs related to prosecuting and defending claims and appeals against the federal government are unallowable. FAR 31.205-47; Singer Co. v. United States, 215 Ct. Cl. 281, 568 F.2d 695 (1977); Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 97-2 BCA ¶ 29,252 modified by 98-1 BCA ¶ 29,653; Marine Hydraulics Int'l, Inc., ASBCA No. 46116, 94-3 BCA ¶ 27,057; P&M Indus., Inc., ASBCA No. 38759, 93-1 BCA ¶ 25,471. This is consistent with the general rule that attorneys' fees are not allowed in suits against the United States absent an express statutory provision allowing recovery. Piggly Wiggly Corp. v. United States, 112 Ct. Cl. 391, 81 F. Supp. 819 (1949).
- (2) The Equal Access to Justice Act, 5 U.S.C. § 504, authorizes courts and boards to award attorneys fees to qualifying prevailing parties unless the government can show that its position was "substantially justified." See, e.g., Midwest Holding Corp., ASBCA No. 45222, 94-3 BCA ¶ 27,138.
- (3) Costs incurred incident to contract administration, or in furtherance of the negotiation of the parties' disputes, are allowable. Bill Strong Enters. v. Shannon, 49 F.3d 1541 (Fed. Cir. 1995)(holding that when the genuine purpose of incurred legal expenses is that of materially furthering a negotiation process, such cost should normally be allowable); FAR 31.205-33 (consultant and professional costs may be allowable if incurred to prepare a demand for payment that does not meet the CDA definition of a "claim").
- (4) Legal fees unrelated to presenting or defending claims against the government are generally allowable. Info. Sys. & Networks Corp., ASBCA No. 42659, 00-1 BCA ¶ 30,665 (holding that legal expenses incurred in lawsuits against third-party vendors were allowable as part of convenience termination settlement). But see Caldera v. Northrop Worldwide Aircraft Servs., Inc., 192 F.3d 962 (Fed. Cir. 1999) (holding that legal expenses incurred unsuccessfully defending wrongful termination actions by employees who would not partake in contractor fraud were not recoverable).

c. Breach Damages. The contractor can recover common law breach of contract damages in certain very narrow situations.

- (1) A contractor may not assert a claim for breach of contract damages when there is a remedy-granting contract clause. Info. Sys. & Network Corp., ASBCA No. 42659, 00-1 BCA ¶ 30,995 (holding that claim for breach damages barred by convenience termination clause); Hill Constr. Corp., ASBCA No. 49820, 99-1 BCA ¶ 30,327 (denying a breach claim for lost profits where the underlying changes were within the ambit of the Changes clause).
- (2) Situations where breach damages may be recovered include:
 - (a) Breach of a requirements contract. Bryan D. Highfill, HUDBCA No. 96-C-118-C7, 99-1 BCA ¶ 30,316.
 - (b) Bad faith termination for convenience. Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (1982).
 - (c) Government's failure to disclose material information. Shawn K. Christensen, dba Island Wide Contracting, AGBCA No. 95-188-R, 95-2 BCA ¶ 27,724.
- (3) Breach damages are measured under common law principles, although cost principles may apply. See AT&T Technologies, Inc. v. United States, 18 Cl. Ct. 315 (1989); Shawn K. Christensen, AGBCA No. 95-188R, 95-2 BCA ¶ 27,724.

- (a) Consequential Damages. The general rule is that consequential damages are not recoverable unless they are foreseeable and caused directly by the government's breach. Prudential Ins. Co. of Am. v. United States, 801 F.2d 1295 (Fed. Cir. 1986); Land Movers Inc. and O.S. Johnson - Dirt Contractor (JV), ENG BCA No. 5656, 91-1 BCA ¶ 23,317 (no recovery of lost profits based on loss of bonding capacity; also no recovery related to bankruptcy, emotional distress, loss of business, etc.).
- (b) Compensatory Damages. A contractor whose contract was breached by the government is entitled to be placed in as good a position as it would have been if it had completed performance. PHP Healthcare Corp., ASBCA No. 39207, 91-1 BCA ¶ 23,647 (the measure of damages for failure to order the minimum quantity is not the contract price; the contractor must prove actual damages). Compensatory damages include a reliance component (costs incurred as a consequence of the breach), and an expectancy component (lost profits). Keith L. Williams, ASBCA No. 46068, 94-3 BCA ¶ 27,196.

d. Interest.

- (1) Pre-Claim Interest. Contractors are not entitled to interest on borrowings, however represented, as part of an equitable adjustment. FAR 31.205-20; Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991); D.E.W. & D.E. Wurzbach, A Joint Venture, ASBCA No. 50796, 98-1 BCA ¶ 29,385; Superstaff, Inc., ASBCA Nos. 48062, et al., 97-1 BCA ¶ 28,845; Tomahawk Constr. Co., ASBCA No. 45071, 94-1 BCA ¶ 26,312. This is consistent with the general rule that the United States is immune from interest liability absent an express statutory provision allowing recovery. Library of Congress v. Shaw, 478 U.S. 310 (1986).

- (2) Lost Opportunity Costs. The damages for the “opportunity cost of money” are unrecoverable as a matter of law. Adventure Group, Inc., ASBCA No. 50188, 97-2 BCA ¶ 29,081; Envtl. Tectonics Corp., ASBCA No. 42,540, 92-2 BCA ¶ 24,902 (not only interest on actual borrowings, but also the economic equivalent thereof, are unallowable); Dravo Corp. v. United States, 219 Ct. Cl. 416, 594 F.2d 842 (1979).
- (3) Cost of Money. Contractors may recover facilities capital cost of money (FCCM) (the cost of capital committed to facilities) as part of an equitable adjustment. FAR 31.205-10. Among the various allowability criteria, a contractor must specifically identify FCCM in its bid or proposal relating to the contract under which the FCCM cost is then claimed. FAR 31.205-10(a)(2). See also McDonnell Douglas Helicopter Company d/b/a McDonnell Douglas Helicopter Systems, ASBCA No. 50756, 98-1 BCA ¶ 29,546.
- (4) Prompt Payment Act Interest. Under the Prompt Payment Act (31 U.S.C. §§ 3901-3907), the contractor is entitled to interest if the contractor submits a proper voucher and the government fails to make payment within 30 days.
- (5) Contract Disputes Act (CDA) Interest. A contractor is entitled to interest on its claim based upon the rate established by the Secretary of the Treasury, as provided by the Contract Disputes Act, 41 U.S.C. § 611. Interest begins to run when the contracting officer receives a properly certified claim (Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991)), or upon submission of a defectively certified claim that is subsequently certified. Federal Courts Administration Act of 1992, Title IX, Pub. L. No. 102-572, 106 Stat. 4506, 4518. Interest runs regardless of whether the claimed costs have actually been incurred at the date of submission of a claim. Servidone Constr. Co. v. United States, 931 F.2d 860 (Fed. Cir. 1991).

- (a) A termination for convenience settlement proposal (FAR 49.206) is not initially considered a CDA claim, as it is generally submitted for purposes of negotiation. Ellett Constr. Co. v. United States, 93 F.3d 1537 (Fed. Cir. 1996). Accordingly, a contractor is not entitled to interest on the amount due under a settlement agreement or determination. FAR 49.112-2(d); Ellett Constr., supra. If a termination settlement proposal matures into a CDA claim (once settlement negotiations reach an impasse), then a contractor is entitled to interest.
 - (6) Payment of Interest. When the contracting officer pays a claim, the payment is applied first to accrued interest. Then the payment is applied to the principal amount due. Any unpaid principal continues to accrue interest. Paragon Energy Corp., ENG BCA No. 5302, 91-3 BCA ¶ 24,349.
- e. Nonappropriated Fund (NAF) Claims.
- (1) The CDA does not generally apply to contracts funded solely with nonappropriated funds, with the exception of Army and Air Force, Navy and Marine Corps exchange contracts. 41 U.S.C. § 602(a). However, the government may choose to include a disputes clause in a NAF contract, thereby giving a contractor recourse to the disputes process.
 - (2) For those NAF claims not under the CDA, a contractor is not entitled to interest on its claim to the contracting officer, or the appeal of its claim per the contractual disputes clause.
 - (3) A contractor is not entitled to attorney's fees on its appeal of a denied claim, as the entitlement to EAJA applies only to appropriated fund contracts.

3. Allocability.

- a. A cost is allocable if incurred specifically for the contract; or the cost benefits both the contract and other work, and is distributed to them in reasonable proportion to the benefits received; or is necessary for the overall operation of the business. FAR 31.201-4; see Caldera v. Northrop Worldwide Aircraft Servs., Inc., 192 F.3d 962 (Fed. Cir. 1999) (holding that attorneys fees incurred unsuccessfully defending wrongful termination actions resulted in no benefit to the contract and were not allocable); Boeing North American, Inc., ASBCA No. 49994, 00-2 BCA ¶ 30,970; Information Systems & Network Corp., ASBCA No. 42659, 00-1 BCA ¶ 30,665; P.J. Dick, Inc., GSBCA No. 12415, 96-2 BCA ¶ 28,307 (finding that accounting fees were costs benefiting the contract).
- b. In certain instances (i.e., impact on other work), the contract appeals boards may ignore the principle of allocability. See Clark Concrete Contractors, Inc. v. General Servs. Admin., GSBCA No. 14340, 99-1 BCA ¶ 30,280 (holding that costs incurred on an unrelated project were recoverable because they were “equitable and attributable” by-products of agency design changes).

4. Reasonableness.

- a. Entitlement is an equitable adjustment or price adjustment does not provide the contractor with the authority to fleece the government. A contractor’s additional costs must be reasonable—i.e., the expenses in both nature and amount must not exceed that which a prudent person would incur in the conduct of a competitive business. FAR 31.201-3.
- b. Reasonable in nature. See Lockheed-Georgia Co., Div. of Lockheed Corp., ASBCA No. 27660, 90-3 BCA ¶ 22,957 (finding that air travel to the Greenbrier resort for executive physicals was unreasonable because competent physicians were available in Atlanta); Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 98-1 BCA ¶ 29,653, modifying 97-2 BCA ¶ 29,252 (buying materials in anticipation of option quantities was unreasonable).

c. Reasonable in amount. TRC Mariah Associates, Inc., ASBCA No. 51811, 99-1 BCA ¶ 30,386; Kelly Martinez d/b/a Kelly Martinez Constr. Servs., IBCA Nos. 3140, 3144-3174, 97-2 BCA ¶ 29,243. But see Raytheon STX Corp., GSBCA No. 14296-COM, 00-1 BCA ¶ 30,632 (holding that salaries paid key employees during a shutdown were reasonable in amount).

d. Profit. In determining the reasonableness of profit as part of an equitable adjustment, profit is calculated as:

(1) The rate earned on the unchanged work;

(2) A lower rate based on the reduced risk of equitable adjustments; or

(3) The rate calculated using weighted guidelines. See Doyle Constr. Co., ASBCA No. 44883, 94-2 BCA ¶ 26,832.

5. Compliance with CAS.

a. Treat like costs in like manner: consistency. Were costs double-counted? Did the contractor charge like expenses both directly and indirectly?

b. Measured in accordance with accounting standards. Contractors can determine costs by using any generally accepted cost accounting method that is equitably and consistently applied. FAR 31.201-1.

C. Make the contractor prove the amount claimed.

1. Burden of Proof.

- a. The burden—a preponderance of the evidence standard—is on the party claiming the benefit of the adjustment. Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994); Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 767 (Fed. Cir. 1987) (moving party “bears the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation”); Deval Corp., ASBCA Nos. 47132, 17133, 99-1 BCA ¶ 30,182 (holding that a contractor’s clear entitlement to an equitable adjustment did not diminish the contractor’s burden of proving the amount of such an adjustment).
- b. What must the party prove for quantum damages?
 - (1) Entitlement (Liability)—the government did something that changed the contractor’s costs, for which the government is legally liable. T.L. James & Co., ENG BCA No. 5328, 89-1 BCA ¶ 21,643.
 - (2) Causation—there must be a causal nexus between the basis for liability and the claimed increase (or decrease) in cost. Hensel Phelps Constr. Co., ASBCA No. 49270, 99-2 BCA ¶ 30,531; Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 98-1 BCA ¶ 29,653, modifying 97-2 BCA ¶ 29,252; Libby Corp., ASBCA No. 40765, 96-1 BCA ¶ 28,255; Oak Adec, Inc. v. United States, 24 Cl. Ct. 502 (1991).
 - (3) Resultant Injury—that there is an actual injury or increased cost to the moving party. Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991); Cascade General, Inc., ASBCA No. 47754, 00-2 BCA ¶ 31,093 (holding that a contractor claim was deficient when it failed to substantiate what specific work and/or delays resulted from the defective government specifications).

2. Measurement of an adjustment.

a. Costs. “Costs” for adjustment formula purposes are the sum of allowable direct and indirect costs, incurred or to be incurred, less any allowable credits, plus cost of money. FAR 31.201-1. If it is an equitable adjustment, one must also calculate the profit on the allowable costs.

b. Direct Costs.

(1) A direct cost is any cost that is identified specifically with a particular contract. Direct costs are not limited to items that are incorporated into the end product as material or labor. All costs identified specifically with a claim are direct costs of that claim. FAR 31.202.

(2) Direct costs generally include direct labor, direct material, subcontracts, and other direct costs.

c. Indirect Costs.

(1) Indirect costs are any costs not directly identified with a single final cost objective, but identified with two or more final cost objectives, or with at least one intermediate cost objective. FAR 31.203. There are two types of indirect costs:

(2) Overhead. Allocable to a cost objective based on benefit conferred. Typical overhead costs include the costs of personnel administration, depreciation of plant and equipment, utilities, and management.

(3) General and administrative (G&A). Not allocable based on benefit, but necessary for overall operation of the business. FAR 31.201-4.

- (4) Calculating indirect cost rates. The total indirect costs divided by the total direct costs equals the indirect cost rate. For example, if a contractor has total indirect costs of \$100,000 in an accounting period, and total direct costs of \$1,000,000 in the same period, the indirect cost rate is 10%.
- (5) Some agencies limit the recoverable overhead through contract clauses. Reliance Ins. Co. v. United States, 931 F.2d 863 (Fed. Cir. 1991) (court upheld clause which limited recoverable overhead for change orders).

3. Pricing Formula.

- a. The basic adjustment formula is the difference between the reasonable cost to perform the work as originally required, and the reasonable cost to perform the work as changed. B.R. Servs., Inc., ASBCA Nos. 47673, 48249, 99-2 BCA ¶ 30,397 (holding that the contractor must quantify the cost difference—not merely set forth the costs associated with the changed work); Buck Indus., Inc., ASBCA No. 45321, 94-3 BCA ¶ 27,061. See also Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994).
- b. Pricing adjustments should not alter the basic profit or loss position of the contractor before the change occurred. “An equitable adjustment may not properly be used as an occasion for reducing or increasing the contractor’s profit or loss...., for reasons unrelated to a change.” Pacific Architects and Eng’rs, Inc. v. United States, 203 Ct. Cl. 499, 508 491 F.2d 734, 739 (1974). See also Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 97-2 BCA ¶ 29,252 modified by 98-1 BCA ¶ 29,653 (holding that a contractor is entitled to profit on additional work ordered by the Army even though the original work was bid at a loss); Westphal Gmph & Co., ASBCA No. 39401, 96-1 BCA ¶ 28194;.
- c. Pricing Additional Work. Agencies price additional work based on the reasonable costs actually incurred in performing the new work. Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302 (1989), aff’d, 909 F.2d 1495 (Fed. Cir. 1990). The contractor should segregate and accumulate these costs.

d. Pricing Deleted Work.

- (1) Agencies price deleted work based on the difference between the estimated costs of the original work and the actual costs of performing the work after the change. Knights' Piping, Inc., ASBCA No. 46985, 94-3 BCA ¶ 27,026; Anderson/Donald, Inc., ASBCA No. 31213, 86-3 BCA ¶ 19,036. But see Condor Reliability Servs., Inc., ASBCA No. 40538, 90-3 BCA ¶ 23,254.
- (2) When the government partially terminates a contract for convenience, a contractor is generally entitled to an equitable adjustment on the continuing work for the increased costs borne by that work as a result of a termination. Deval Corp., ASBCA Nos. 47132, 47133, 99-1 BCA 30,182; Cal-Tron Sys., Inc., ASBCA Nos. 49279, 50371 97-2 BCA ¶ 28,986; Wheeler Bros., Inc., ASBCA No. 20465, 79-1 BCA ¶ 13,642.

e. Responsibility. Where the contractor shares the fault, it shares liability for the added costs. See Essex Electro Engineers, Inc., v. Danzig, 224 F.3d 1283 (Fed. Cir. 2000); Dickman Builders, Inc., ASBCA No. 32612, 91-2 BCA ¶ 23,989.

4. Methods of Proof.

a. Actual Cost Method. The actual cost method is the preferred method for proving costs. Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991).

- (1) A contractor must prove its costs using the best evidence available under the circumstances. The preferred method is actual cost data. Cen-Vi-Ro of Texas, Inc. v. United States, 210 Ct. Cl. 684, 538 F.2d 348 (1976); Deval Corp., ASBCA Nos. 47132, 47133, 99-1 BCA 30,182.

- (2) The contracting officer may include the Change Order Accounting clause, FAR 52.243-6, in a contract. This clause permits the contracting officer to order the accumulation of actual costs. A contractor must indicate in its proposal, which proposed costs are actual and which are estimates.
- (3) Failure to accumulate actual cost data may result in either a substantial reduction or total disallowance of the claimed costs. Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302 (1989), aff'd, 909 F.2d 1495 (Fed. Cir. 1990) (recovery reduced for unexcused failure to segregate); Togaroli Corp., ASBCA No. 32995, 89-2 BCA ¶ 21,864 (costs not segregated despite the auditor's repeated recommendation to do so; no recovery beyond final decision); Assurance Co., ASBCA No. 30116, 86-1 BCA ¶ 18,737 (lack of cost data prevented reasonable approximation of damages for jury verdict, therefore, the appellant recovered less than the amount allowed in the final decision).

b. Estimated Cost Method.

- (1) Good faith estimates are preferred when actual costs are not available. Lorentz Brunn Co., GSBGA No. 8505, 88-2 BCA ¶ 20,719 (estimates of labor hours and rates admissible). Estimates are generally required when negotiating the cost of a change in advance of performing the work. Estimates are an acceptable method of proving costs where they are supported by detailed substantiating data or are reasonably based on verifiable cost experience. J.M.T. Mach. Co., ASBCA No. 23928, 85-1 BCA ¶ 17,820 (1984), aff'd on other grounds, 826 F.2d 1042 (Fed. Cir. 1987).
- (2) If the contractor uses detailed estimates based on analyses of qualified personnel, the government will not be able to allege successfully that the contractor used the disfavored total cost method of adjustment pricing. Illinois Constructors Corp., ENG BCA No. 5827, 94-1 BCA ¶ 26,470.

- (3) Estimates based on Mean's Guide must be disregarded where actual costs are known. Anderson/Donald, Inc., ASBCA No. 31213, 86-3 BCA ¶ 19,036.

c. Total Cost Method.

- (1) The total cost method is not preferred because it assumes the entire overrun is solely the government's fault. The total cost method calculates the difference between the bid price on the original contract and the actual total cost of performing the contract as changed. Propellex Corp. v. Brownlee, 342 F.3d 1335 (Fed. Cir. 2003); Servidone v. United States, 931 F.2d 860 (Fed. Cir. 1991); Stewart & Stevenson Servs., Inc., ASBCA No. 43631, 98-1 BCA ¶ 29,653, modifying 97-2 BCA ¶ 29,252; Concrete Placing Inc. v. United States, 25 Cl. Ct. 369 (1992).
- (2) The use of a total cost method is tolerated only when no other means are possible, when the reliability of the supporting documentation is fully substantiated, and when the contractor establishes the subsequent four factors:
 - (a) The nature of the particular cost is impossible or highly impracticable to determine with a reasonable degree of certainty;
 - (b) The contractor's bid was realistic;
 - (c) The contractor's actual incurred costs were reasonable; and
 - (d) The contractor was not responsible for any of the added costs. Propellex Corp. v. Brownlee, 342 F.3d 1335 (Fed. Cir. 2003); Northrop Grumman Corp. v. United States, 47 Fed. Cl. 20 (2000); Grumman Aerospace Corp., ASBCA No. 48006, Feb. 27, 2006, 2006 ASBCA LEXIS 20.

d. Modified total cost method.

- (1) A modified total cost method involves use of a total cost method that the contractor has adjusted to account for other factors, usually because the original bid was not realistic, or because there were independent causes for certain extra costs. A modified total cost method of assessing damages or price adjustment may also be used only as a last resort in those extraordinary circumstances where no other way to compute damages is feasible. ECC Int'l Corp., ASBCA Nos. 45041, 44769, 39044, 94-2 BCA ¶ 26,639; Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991).
- (2) With the exception of the modification, contractor must again establish the same four factors as with total cost claims. Propellex Corp. v. Brownlee, 342 F.3d 1335 (Fed. Cir. 2003); Grumman Aerospace Corp., ASBCA No. 48006, Feb. 27, 2006, 2006 ASBCA LEXIS 20; River/Road Constr. Inc., ENG BCA No. 6256, 98-1 BCA ¶ 29,334; Libby Corp., ASBCA No. 40765, 96-1 BCA ¶ 28,255.

e. Jury Verdicts. Jury verdicts are not a method of proof, but a means of resolving disputed facts. Northrop Grumman Corp. v. United States, 47 Fed. Cl. 20 (2000); Delco Elecs. Corp. v. United States, 17 Cl. Ct. 302 (1989), aff'd, 909 F.2d 1495 (Fed. Cir. 1990); River/Road Constr. Inc., ENG BCA No. 6256, 98-1 BCA ¶ 29,334; Cyrus Contracting Inc., IBCA Nos. 3232 et. al, 98-2 BCA ¶ 29,755; Paragon Energy Corp., ENG BCA No. 5302, 88-3 BCA ¶ 20,959. Before adopting a jury verdict approach, a court must first determine three things:

- (1) There is clear proof of injury;
- (2) No more reliable method exists. See Dawco Constr. Co. v. United States, 930 F.2d 872 (Fed. Cir. 1991) (actual costs are preferred; where contractor offers no evidence of justifiable inability to provide actual costs, then it is not entitled to a jury verdict); Service Eng'g Co., ASBCA No. 40274, 93-2 BCA ¶ 25,885; and

- (3) The evidence is sufficient for a fair approximation of the damages. Northrop Grumman Corp. v. United States, 47 Fed. Cl. 20 (2000).

5. Supported by the facts.

- a. Generally. In order to sustain its burden of proof regarding the amount claimed, a contractor must submit adequate and material supporting documentation. Libby Corp., ASBCA No. 40765, 96-1 BCA ¶ 28,255 (denying contractor's claim where claim was prepared by outside counsel, who did not testify, and unsupported by contractor's witnesses, who had no actual knowledge of how the claim was prepared).
- b. Pertinent Inquiries. While not exclusive, the following questions aid in determining whether the claimed amount is adequately supported: Was the claim prepared and/or validated by the contractor's witnesses?; Can the contractor explain how the claim was derived?; Is it supported by contemporaneous records?; Are the contractor's submissions, especially with regard to historical information, consistent?; Does the contractor's treatment of costs adhere to its CAS disclosure statement?

6. Certification Requirements. The Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. 103-355, § 2301, 108 Stat. 3243 (1994) amended 10 U.S.C. § 2410, Requests for Equitable Adjustment or Other Relief: Certification.

- a. In DOD, a request for equitable adjustment that exceeds the simplified acquisition threshold (currently, \$100,000) may not be paid unless a person authorized to certify the request on behalf of the contractor certifies that:
 - (1) The request is made in good faith, and
 - (2) The supporting data is accurate and complete to the best of that person's knowledge. 10 U.S.C. § 2410(a).

- b. Similarly, after negotiating an agreement on a modification settling a request for equitable adjustment on a negotiated contract, the contractor must furnish a certificate of current cost and pricing data if the modification exceeds \$500,000 under the Truth in Negotiations Act. 10 U.S.C. § 2306(a).

D. See What Really Happened (seize the offensive).

1. A contractor's cost data will tell you what really happened. Accordingly, you must seize the initiative/go on the offensive. This allows you to develop the "real story" of how the contractor incurred extra costs.
2. Determine the true root causes of the contractor's extra costs.
 - a. Was the job as a whole underbid?
 - b. Did the contractor change planned facilities?
 - c. Did the contractor purchase cheap and unworkable component parts?
 - d. Did the contractor select subcontractors that were unable to perform?
 - e. Was there reliance upon less competent vendors?
 - f. Were there increases in material costs?
 - g. Did the contractor change components for cost reasons? Did this in turn result in engineering problems? Did prior design work become worthless? Did this in turn cause the need for redesign work, with more time and effort?
 - h. Was there an overall lack of efficient organization?

- i. Did the contractor waste time recompeting components and vendors?
 - j. What expenses were unrelated to the claimed causation?
 - k. Did the contractor order surplus material (for potential options and possible commercial jobs)?
3. Important Documents. There are many important contractor documents that will assist you in determining what really happened.
- a. As-Bid Bill of Materials (BOM), and Final BOM.
 - b. Production Schedules
 - c. As-Bid Bid Rates (Overhead Rates).
 - d. Actual Overhead Rates.
 - e. Expected and Actual Direct Costs—for the specific contract and plant-wide.
 - f. Expected and Actual Labor Amounts—for the specific contract and plant-wide.
 - g. Material Invoices for Major Component Parts.
 - h. CAS Disclosure Statement.
4. The Quantum Case Litigation Team. It is necessary to enlist the support of many individuals in both your defensive and offensive quantum case litigation efforts. These individuals will help you decipher the contractor's accounting documentation, as well as explain relevance in relation to contract performance.
- a. DCAA Auditor.

- b. Contracting Officer.
- c. Program Manager/End User.
- d. Contracting Officer's Representative (COR).
- e. Project Managers, Site Inspectors, Project Engineers, Quality Assurance Representatives.

IV. SPECIAL ITEMS.

A. Unabsorbed Overhead.

1. Generally. A type of cost associated with certain types of claims is "unabsorbed overhead." Unabsorbed overhead has been allowed to compensate a contractor for work stoppages, idle facilities, inability to use available manpower, etc., due to government fault. In such delay situations, fixed overhead costs, e.g., depreciation, plant maintenance, cost of heat, light, etc., continue to be incurred at the usual rate, but there is less than the usual direct cost base over which to allocate them. Therm-Air Mfg. Co., ASBCA No. 15842, 74-2 BCA ¶ 10,818.
2. Contracts Types. Most unabsorbed overhead cases deal with recovery of additional overhead costs on construction and manufacturing contracts. The qualitative formula adopted in Eichleay Corp., ASBCA 5183, 60-2 BCA ¶ 2688, aff'd on recons., 61-1 BCA ¶ 2894, is the exclusive method of calculating unabsorbed overhead for both construction contracts (Wickham Contracting Co. v. Fischer, 12 F.3d 1574 (Fed. Cir. 1994)) and manufacturing contracts (West v. All State Boiler, Inc., 146, F.3d 1368 (Fed. Cir. 1998); Genisco Tech. Corp., ASBCA No. 49664, 99-1 BCA ¶ 30,145, mot. for recons. den., 99-1 BCA ¶ 30,324; Libby Corp., ASBCA No. 40765, 96-1 BCA ¶ 28,255).
 - a. Under this method, calculate the daily overhead rate during the contract period, then multiply the daily rate by the number of days of delay.

b. To be entitled to unabsorbed overhead recovery under the Eichleay formula, the following three elements must be established:

- (1) a government-caused or government-imposed delay,
- (2) the contractor was required to be on “standby” during the delay, and
- (3) while “standing by,” the contractor was unable to take on additional work.

Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999); West v. All State Boiler, 146 F.3d 1368 (Fed. Cir. 1998); Satellite Elec. Co. v. Dalton, 105 F.3d 1418 (Fed. Cir. 1997); Altmayer v. Johnson, 79 F.3d 1129 (Fed. Cir. 1995); Mech-Con Corp. v. West, 61 F.3d 883 (Fed Cir. 1995).

c. If work on the contract continues uninterrupted, albeit in a different order than originally planned, the contractor is not on standby. Further, a definitive delay precludes recovery “because ‘standby’ requires an uncertain delay period where the government can require the contractor to resume full-scale work at any time.” Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999).

d. A contractor’s ability to take on additional work focuses upon the contractor’s ability to take on replacement work during the indefinite standby period. Replacement work must be similar in size and length to the delayed government project and must occur during the same period. Melka Marine, Inc. v. United States, 187 F.3d 1370 (Fed. Cir. 1999); West v. All-State Boiler, 146 F.3d 1368, 1377 n.2 (Fed. Cir. 1998).

3. Proof Requirements.

- a. Recovery of unabsorbed overhead is not automatic. The contractor should offer credible proof of increased costs resulting from the government-imposed delay. Beaty Elec. Co., EBCA No. 403-3-88, 91-2 BCA ¶ 23,687; but see Sippial Elec. & Constr. Co. v. Widnall, 69 F.3d (Fed. Cir. 1995) (allowing Eichleay recovery with proof of actual damages).
 - b. A contractor must prove only the first two elements of the Eichleay formula. Once the contractor has established the Government-caused delay and that it had to remain on “standby,” it has made a prima facie case that it is entitled to Eichleay damages. The burden of proof then shifts to the government to show that the contractor did not suffer or should not have suffered any loss because it was able to either reduce its overhead or take on other work during the delay. Satellite Elec. Co. v. Dalton, 105 F.3d 1418 (Fed. Cir. 1997); Mech-Con Corp. v. West, 61 F.3d 883 (Fed. Cir. 1995).
 - c. When added work causes a delay in project completion, the additional overhead is absorbed by the additional costs and Eichleay does not apply. Community Heating & Plumbing Co. v. Kelso, 987 F.2d 1575 (Fed. Cir. 1993) (Eichleay recovery denied because overhead was “extended” as opposed to “unabsorbed”); accord C.B.C. Enters., Inc. v. United States, 978 F.2d 669 (Fed. Cir. 1992).
4. Subcontractor Unabsorbed Overhead. Timely completion by a prime contractor does not preclude a subcontractor’s pass-through claim for unabsorbed overhead. E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).
 5. Multiple Recovery. A contractor may not recover unabsorbed overhead costs under the Eichleay formula where it has already been compensated for the impact of the government’s constructive change on performance time and an award under Eichleay would lead to double recovery of overhead. Keno & Sons Constr. Co., ENG BCA No. 5837-Q, 98-1 BCA ¶ 29,336.

6. Profit. A contractor is not entitled to profit on an unabsorbed overhead claim. ECC Int'l Corp., ASBCA Nos. 45041, 44769, 39044, 94-2 BCA ¶ 26,639; Tom Shaw, Inc., ASBCA No. 28596, 95-1 BCA ¶ 27,457; FAR 52.212-12, 52.212-15.

B. Subcontractor Claims.

1. The government consents generally to be sued only by parties with which it has privity of contract. Erickson Air Crane Co. of Wash. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1984); E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).
2. A prime contractor may sue the government on a subcontractor's behalf, in the nature of a pass-through suit, for the extra costs incurred by the subcontractor only if the prime contractor is liable to the subcontractor for such costs. When a prime contractor is permitted to sue on behalf of a subcontractor, the subcontractor's claim merges into that of the prime, because the prime contractor is liable to the subcontractor for the harm caused by the government. Absent proof of prime contractor liability, the government retains its sovereign immunity from pass-through suits. Severin v. United States, 99 Ct. Cl. 435 (1943), cert. denied, 322 U.S. 733 (1944)); E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).
3. The government may use the Severin doctrine as a defense, however, only when it raises and proves the issue at trial. If the government fails to raise its immunity defense at trial, then the subcontractor claim is treated as if it were the prime's claim and any further concern about the absence of subcontractor privity with the government is extinguished. Severin v. United States, 99 Ct. Cl. 435 (1943), cert. denied, 322 U.S. 733 (1944)); E.R. Mitchell Constr. Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).

C. Loss of Efficiency. The disruption caused by government changes and/or delays may cause a loss of efficiency to the contractor.

1. Burden of Proof. A contractor may recover for loss of efficiency if it can establish both that a loss of efficiency has resulted in increased costs and that the loss was caused by factors for which the Government was responsible. Luria Bros. & Co. v. United States, 177 Ct. Cl. 676, 369 F.2d 701 (1966). See generally Thomas E. Shea, Proving Productivity Losses in Government Contracts, 18 Pub. Cont. L. J. 414 (March 1989).
2. Applicable Situations. Loss of efficiency has been recognized as resulting from various conditions causing lower than normal or expected productivity. Situations include: disruption of the contractor's work sequence (Youngdale & Sons Constr. Co. v. United States, 27 Fed. Cl. 516 1993)); working under less favorable weather conditions (Warwick Constr., Inc., GSBCA No. 5070, 82-2 BCA ¶ 16,091); the necessity of hiring untrained or less qualified workers (Algernon-Blair, Inc., GSBCA No. 4072, 76-2 BCA ¶ 12,073); and reductions in quantity produced.

D. Impact on Other Work.

1. General Rule. A contractor is generally prohibited from recovering costs under the contract in which a Government change, suspension, or breach occurred, when the impact costs are incurred on other contracts. Courts and boards usually consider such damages too remote or speculative, and subject to the rule that consequential damages are not recoverable under Government contracts. See General Dynamics Corp. v. United States, 218 Ct. Cl. 40, 585 F.2d 457 (1978); Sermor, Inc., ASBCA No. 30576, 94-1 BCA ¶ 26,302.
2. Exceptions. In only exceptional circumstances, especially when the impact costs are definitive in both causation and amount, contractors have recovered for additional expenses incurred in unrelated contracts. See Clark Concrete Contractors, Inc. v. General Servs. Admin., GSBCA No. 14340, 99-1 BCA ¶ 30,280 (allowing recovery of additional costs incurred on an unrelated project as a result of government delays and changes).

V. CONCLUSION.

A. Have the right philosophy.

1. The fact that contractor entitlement exists is meaningless for quantum.
2. The contractor's claim: Cut it up and then kill it.

B. Recognize certain prerequisites.

1. Have a thorough understanding of the law on pricing of adjustments.
2. Facts are king, and getting all the facts will take hard work.

C. Apply the DAMS Methodology.

1. Divide the contractor's claim into component parts.
2. Apply Cost/Cost Accounting Standards (CAS) principles.
3. Make the contractor prove the amount claimed.
4. See what really happened.

CHAPTER 21

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CHAPTER 21

PROCUREMENT FRAUD

I. INTRODUCTION.

“The United States does not stand on the same footing as an individual in a suit to annul a deed or lease obtained from him by fraud. . . . The financial element in the transaction is not the sole or principle thing involved. This suit was brought to vindicate the policy of the Government. . . . The petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States.” Pan Am. Petroleum and Transp. v. United States, 273 U.S. 456, 509 (1927).

II. TYPES OF FRAUD.

- A. Defective Product/Product Substitution: These terms generally refer to cases where contractors deliver to the Government goods which do not conform to contract requirements without informing the Government. United States v. Hoffman, 62 F. 3d 1418 (6th Cir. 1995).
- B. Defective Testing: This subset of defective products cases results from the failure of a contractor to perform contractually required tests, or its failure to perform such testing in the required manner.
- C. Bid-Rigging: The absence of competition deprives the government of its most reliable measure of what the price should have been. Measure of damages is “the difference between what the government actually paid on the fraudulent claim and what it would have paid had there been fair, open and competitive bidding.” United States v. Killough, 848 F.2d 1523, 1532 (11th Cir. 1988); see also Brown v. United States, 524 F.2d 693, 706 (1975); United States v. Porat, 17 F.3d 660 (3rd Cir. 1993).

- D. Bribery and Public Corruption: The breach of an employee's duty of loyalty. See, e.g., United States v. Carter, 217 U.S. 286 (1910); United States v. Brewster, 408 U.S. 501 (1972).
- E. Defective Pricing: The Truth in Negotiations Act ("TINA"), 10 U.S.C. § 2306a, together with its implementing regulations, 48 C.F.R. § 15.8 et seq. ("Price Negotiation"), requires contractors in certain negotiated procurements to disclose and certify that disclosed details concerning expected costs ("cost or pricing data") are accurate, current and complete. A perceived or actual violation of TINA may serve as the predicate for a fraud investigation and civil or criminal prosecution by the Government. United States v. Broderson, 67 F. 3d 452 (2d Cir. 1995).
- F. False Invoices. Shaw v. AAA Engineering & Drafting, Inc., 213 F.3d 545 (10th Cir. 2000) (Monthly invoices submitted when the contractor was knowingly not complying with contract terms can be the basis of False Claims Act liability. A claimant can premise a claim on a "false implied certification of contractual compliance.")

III. GOVERNMENT POLICY FOR COMBATTING PROCUREMENT FRAUD.

- A. Department of Justice (DOJ) Policy. DOJ policy requires the coordination of parallel criminal, civil, and administrative proceedings so as to maximize the government's ability to obtain favorable results in cases involving procurement fraud. See U.S. Dep't of Justice, U.S. Att'ys Man. ch. 1-12.000 (Coordination of Parallel Criminal, Civil, and Administrative Proceedings) June 1998.
- B. Department of Defense (DOD) Policy. DOD policy requires the coordinated use of criminal, civil, administrative, and contractual remedies in suspected cases involving procurement fraud. See U.S. DEPT OF DEFENSE, DIR. 7050.5, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO PROCUREMENT ACTIVITIES (7 June 1989); U.S. DEP'T OF ARMY, REG. 27-40, LITIGATION, 19 Sept. 1994; U.S. DEP'T OF AIR FORCE, DIR. 51-11, COORDINATION OF REMEDIES FOR FRAUD AND CORRUPTION RELATED TO AIR FORCE PROCUREMENT MATTERS, 21 Oct. 1994; U.S. DEP'T OF NAVY, INST. 5430.92A, OP-008, ASSIGNMENT OF RESPONSIBILITIES TO COUNTERACT FRAUD, WASTE, AND RELATED IMPROPRIETIES WITHIN THE DEPARTMENT OF THE NAVY, (20 Aug. 1987).

1. DOD policy requires each department to establish a centralized organization to monitor all significant fraud and corruption cases.
2. Definition of a “significant” case.
 - a. All fraud cases involving an alleged loss of \$100,000 or more.
 - b. All corruption cases that involve bribery, gratuities, or conflicts of interest.
 - c. All investigations into defective products or product substitution in which a serious hazard to health, safety, or operational readiness is indicated (regardless of loss value).
3. Each centralized organization monitors all significant cases to ensure that all proper and effective criminal, civil, administrative, and contractual remedies are considered and pursued in a timely manner.
4. Product Substitution/Defective Product cases receive special attention.
5. DOD Voluntary Disclosure Program. DOD IG Pamphlet IGDPH 5505.50, Voluntary Disclosure Program—A Description of the Process (April, 1990).

IV. PLAYERS INVOLVED IN FRAUD ABATEMENT.

- A. DOD Inspector General. Inspector General Act of 1978, Pub. L. 95-452, as amended by Pub. L. No. 97-252; DOD Dir. 5106.1, Inspector General of Department of Defense (Mar. 14, 1983).
- B. Military Criminal Investigative Organizations.

- C. Department of Justice. DOD Dir. 5525.7, Memorandum of Understanding Between Department of Defense and Department of Justice Relating to the Investigation and Prosecution of Certain Crimes (Jan. 22, 1985).
- D. Procurement Fraud Division (PFD), USALSA. AR 27-40, Litigation, Ch. 8.
- E. Procurement Fraud Advisors (PFA) (subordinate commands) - ensure that commanders and contracting officers pursue, in a timely manner, all applicable criminal, civil, contractual, and administrative remedies.

V. CONTRACTING OFFICER AUTHORITY.

- A. Actions Clearly Exceeding KO Authority. The Contract Disputes Act, 41 U.S.C. § 605(a), as implemented by FAR 33.210, prohibits any contracting officer or agency head from settling, paying, compromising or otherwise adjusting any claim involving fraud.
- B. Actions Clearly Within KO Authority.
 - 1. Refusing Payment. It is the plain duty of administrative, accounting, and auditing officials of the government to refuse approval and to prevent payment of public monies under any agreement on behalf of the United States as to which there is a reasonable suspicion of irregularity, collusion, or fraud, thus reserving the matter for scrutiny in the courts when the facts may be judicially determined upon sworn testimony and competent evidence and a forfeiture declared or other appropriate action taken. To the Secretary of the Army, B-154766, 44 Comp. Gen. 111 (1964).
 - 2. Suspend Progress Payments. 10 U.S.C. § 2307(e)(2); Brown v. United States, 207 Ct. Cl. 768, 524 F.2d 693 (1975); Fidelity Construction, DOT CAB No. 1113, 80-2 BCA ¶ 14,819.
 - 3. Withhold Payment.

- a. When a debarment/suspension report recommends debarment or suspension based on fraud or criminal conduct involving a current contract, all funds becoming due on that contract shall be withheld unless directed otherwise by the Head of the Contracting Activity (HCA) or the Commander, U.S. Army Legal Services Agency. AFARS 9.406-3.
- b. Labor standards statutes provide for withholding for labor standards violations. WHA – 41 U.S.C. § 36; DBA – 40 U.S.C. § 276a-2; SCA – 41 U.S.C. § 353(a).
- c. Specific contract provisions may provide for withholding (e.g., service contract deductions for deficiencies in performance).
- d. Terminate Negotiations. FAR 49.106 (terminate settlement discussions regarding a terminated contract upon suspicion of fraud); K&R Eng'g Co., Inc., v. United States, 222 Ct. Cl. 340, 616 F.2d 469 (1980).
- e. Determine Contractor to be Nonresponsible. FAR Subpart 9.4.

VI. REPORTING REQUIREMENTS.

- A. Indicators of Fraud. Indicators of Fraud in DOD Procurement, IG, DOD 4075.1-H (June 1987). Common examples include:
 - 1. Anticompetitive Activities. 15 U.S.C. § 1.
 - 2. False Statements. 18 U.S.C. § 1001.
 - 3. False Claims. 18 U.S.C. § 287.

- B. Upon receiving or uncovering substantial indications of procurement fraud:
1. PFA should report the matter promptly to their supporting Army Criminal Investigation Command (USACIDC) element.
 2. In such cases, the PFA must also submit a “Procurement Flash Report” to PFD. The flash report should contain the following information:
 - a. Name and address of contractor;
 - b. Known subsidiaries of parent firms;
 - c. Contracts involved in potential fraud;
 - d. Nature of the potential fraud;
 - e. Summary of the pertinent facts; and
 - f. Possible damages.
 3. DFARS 209.406-3 Report. The contracting officer is also required to submit an investigative-referral report.
 4. Remedies Plan. In significant cases, the PFA must prepare a comprehensive remedies plan. The remedies plan should include the following:
 - a. Summary of allegations;
 - b. Statement of adverse impact on DOD mission;
 - c. Statement of impact upon combat readiness and safety of DA personnel; and

- d. Consideration of each criminal, civil, contractual, and administrative remedy available.
- 5. Litigation Report. If the PFA determines that a civil proceeding, such as under the Civil False Claims Act, may be appropriate, the PFA should consult PFD to determine if a litigation report is necessary.

VII. CRIMINAL STATUTES.

- A. Conspiracy to Defraud, 18 U.S.C. § 286 (with claims) and 18 U.S.C. § 371 (in general). The general elements of a conspiracy under either statute include:
 - 1. Knowing agreement by two or more persons which has as its object the commission of a criminal offense, or to defraud the United States; United States v. Upton, 91 F.3rd 677 (5th Cir. 1996);
 - 2. Intentional and actual participation in the conspiracy; and
 - 3. Performance by one or more of the conspirators of an overt act in furtherance of the unlawful goal. United States v. Falcone, 311 U.S. 205, 210-211 (1940); United States v. Richmond, 700 U.S. 1183, 1190 (8th Cir. 1983).
- B. False Claims, 18 U.S.C. § 287.
 - 1. The elements required for a conviction under Section 287 include:
 - a. Proof of a claim for money or property, which is false, fictitious, or fraudulent and material.
 - b. Made or presented against a department or agency of the United States; and

- c. Submitted with a specific intent to violate the law or with a consciousness of wrongdoing, i.e., the person must know at the time that the claim is false, fictitious, or fraudulent. See generally United States v. Slocum, 708 F.2d 587, 596 (11th Cir. 1983) (citing United States v. Computer Sciences Corp., 511 F. Supp. 1125, 1134 (E.D. Va. 1981), rev'd on other grounds, 689 F.2d 1181 (4th Cir. 1981)) (false indemnity claims made to USDA).
 - 2. It is of no significance to a prosecution under section 287 that the claim was not paid. United States v. Coachman, 727 F.2d 1293, 1302 (D.C. Cir.), cert. denied, 419 U.S. 1047 (1984).
- C. False Statements, 18 U.S.C. § 1001.
- 1. The elements include proof that:
 - a. The defendant made a statement or submitted a false entry. “Statement” has been interpreted to include oral and unsworn statements. United States v. Massey, 550 F.2d 300 (5th Cir.), on remand, 437 F. Supp. 843 (M.D. Fla. 1977).
 - b. The statement was false.
 - c. The statement concerned a matter within the jurisdiction of a federal department or agency.
 - d. The government also must prove that a statement was “material.” The test of materiality is whether the natural and probable tendency of the statement would be to affect or influence governmental action. United States v. Lichenstein, 610 F.2d 1272, 1278 (5th Cir. 1980); United States v. Randazzo, 80 F. 3d 623, 630 (1st Cir. 1996); United States ex. Rel. Berge v. Board of Trustees University of Alabama, 104 F.3d 1453 (4th Cir. 1997).
 - e. Intent.

- (1) The required intent has been defined as “the intent to deprive someone of something by means of deceit.” United States v. Lichenstein, 610 F.2d 1272, 1277 (5th Cir. 1980).
- (2) A false statement must be knowingly made and willfully submitted. United States v. Guzman, 781 F.2d 428, (5th Cir. 1986).

D. Mail Fraud and Wire Fraud: 18 U.S.C. §§ 1341-43.

1. The essence of the mail fraud and wire fraud statutes is the use of mails or wire communications to execute a scheme to defraud the United States. Both statutes are broadly worded to prohibit the use of the mails or interstate telecommunications systems to further such schemes.
2. The elements of the two offenses are similar. Because the elements are similar, the cases interpreting the more recent wire fraud statute rely on the precedents interpreting mail fraud. See, e.g., United States v. Cusino, 694 F.2d 185 (9th Cir. 1982), cert. denied, 461 U.S. 932 (1983); United States v. Merlinger, 16 F. 3rd 670 (6th Cir. 1994). They include:
 - a. Formation of a scheme and artifice to defraud.
 - b. Use of either the mails or interstate wire transmissions in furtherance of the scheme. See United States v. Pintar, 630 F.2d 1270, 1280 (8th Cir. 1980) (mail fraud); United States v. Wise, 553 F.2d 1173 (8th Cir. 1977) (wire fraud).

E. Major Fraud Act. 18 U.S.C. § 1031.

1. The Act created a new criminal offense of “major fraud” against the United States. It is designed to deter major defense contractors from committing procurement fraud by imposing stiffer penalties and significantly higher fines.

2. Maximum Punishments: ten years confinement; fines are determined on a sliding scale based on certain aggravating factors. Basic Offense: \$1,000,000 per count. Government loss or contractor gain of \$500,000 or more: \$5,000,000. Conscious or reckless risk of serious personal injury: \$5,000,000. Multiple counts: \$10,000,000 per prosecution.
3. Elements:
 - a. Knowingly engaging in any scheme with intent to defraud the U.S. or to obtain money by false or fraudulent pretenses;
 - b. On a U.S. contract; and
 - c. Valued at \$1,000,000 or more. United States v. Brooks, 111 F.3d 365 (4th Cir. 1997). But see United States v. Nadi, 996 F.2d 548 (2nd Cir. 1993); United States v. Sain, 141 F.3d 463 (Fed. Cir. 1998).

F. Title 10 (UCMJ) Violations.

VIII. CIVIL REMEDIES.

A. The Civil False Claims Act. 31 U.S.C. §§ 3729-33 (1988).

1. Background.
2. 1986 Amendments.
3. The primary litigation weapon for combating fraud is the Civil False Claims Act.

B. Liability Under the False Claims Act.

1. In General. 31 U.S.C. § 3729(a), imposes liability on any person (defined comprehensively in 18 U.S.C. § 1 (1988) to include “corporations, companies, associations, partnerships . . . as well as individuals”) who:

- a. Knowingly presents, or causes to be presented, to an officer or employee of the United States government or a member of the Armed Forces of the United States, a false or fraudulent claim for payment or approval. United States v. Krizek, 111 F.3d 934 (D.C. 1997).
 - b. Conspires to defraud the government by having a false or fraudulent claim allowed or paid.
 - c. Knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the United States.
2. Source of funds used to pay. Funds with which a claim would be paid need not be “the United States’s own money in the public fisc which requires Congressional appropriation to be withdrawn from the Treasury. Rather, it is enough if the money belongs to the United States.” United States ex rel. DRC, Inc. v. Custer Battles, LLC, et. al., E.D. Va. No1:04cv199 (8 July 2005) (dismissing motion to dismiss qui tam suit and holding that False Claims Act applies to work in Iraq paid by the Coalition Provisional Authority but not to funds from the Development Fund for Iraq).

C. Damages.

1. Treble Damages are the substantive measure of liability. 31 U.S.C. § 3729(a); United States v. Peters, 110 F.3d 66 (8th Cir. 1997). Voluntary disclosures of the violation prior to the investigation, preclude the imposition of treble damages.
2. Different Scenarios.
 - a. Defective Products.
 - b. Defective Testing.
 - c. Bid-Rigging.

d. Bribery and Public Corruption.

D. Civil Penalties.

1. A civil penalty of between \$5,500 and \$11,000 per false claim. 31 U.S.C. § 3729. The amounts stated in the False Claims Act, 31 U.S.C. section 3729, are \$5,000 and \$10,000; however, under the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134, §31001, 110 Stat. 1321-373 (1996), federal agencies are required to review and adjust statutory civil penalties for inflation every four years. Consequently, the Department of Justice has adjusted penalties under the False Claims Act to range not less than \$5,500 and not more than \$11,000 per violation. 28 C.F.R. § 85.3(a)(9)(2000).
2. Imposition is “automatic and mandatory for each false claim.” S. Rep No. 345 at 8-10. See also United States v. Hughes, 585 F.2d 284, 286 (7th Cir. 1978) (“[t]his forfeiture provision is mandatory; it leaves the trial court without discretion to alter the statutory amount.”)
1. There is no requirement for the United States to prove that it suffered any damages. Fleming v. United States, 336 F.2d 475, 480 (10th Cir. 1964), cert. denied, 380 U.S. 907 (1965). The government also does not have to show that it made any payments pursuant to false claims. United States v. American Precision Products Corp., 115 F. Supp. 823 (D.N.J. 1953).
2. United States v. Halper, 490 U.S. 435 (1989): Defendant faced aggregated penalties of \$130,000 for fraud, which had damaged the government in the amount of \$585. A civil sanction, in application, may be so divorced from any remedial goal as to constitute punishment under some circumstances. The scope of the holding is a narrow one, addressed to “the rare case . . . where a fixed-penalty provision subjects a small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused.” See United States v. Hatfield, 108 F.3d 67 (4th Cir. 1997).

IX. THE QUI TAM PROVISIONS OF THE FALSE CLAIMS ACT.

Background.

1. “Qui tam pro domino rege quam pro se ipso in hac parte sequitur.” (“Who as well for the King as for himself sues in this matter.”)
2. Overview of the Process.
 - a. The Civil False Claims Act authorizes an individual, acting as a private attorney general, to bring suit in the name of the United States. 31 U.S.C. § 3730. The statute gives the Government 60 days to decide whether to join the action. If the Government joins the action, the Government conducts the action. If the Government decides not to join the suit, the individual (known as the “qui tam relator” conducts the action.
 - b. As an inducement to be a whistleblower, the statute provides that relators are entitled to portions of any judgment against the defendant. 31 U.S.C. § 3730(d).
 - c. If the government joins and conducts the suit, the relator is entitled to between 15 and 25 percent of judgment, depending on the relator’s contribution to the success of the suit.
 - d. If the Government declines to join and the relator conducts the suit, the relator is entitled to between 25 and 30 percent of the judgment, at the discretion of the court.
 - e. Limitations on Relators. 31 U.S.C. § 3730(e)(4) significantly limits a person’s ability to become a qui tam relator by providing that no court will have jurisdiction over an action “based on the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accountability Office report, hearing, audit or investigation, or from the news media” unless the person bringing the action is an “original source” of the information. The statute defines “original source” as an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action based on the information.
3. Qui Tam Litigation is a Growth Industry.

4. Qui Tam Developments.

- a. Hughes Aircraft Company v. United States ex rel. Schumer, 520 U.S. 939 (1997). The first United States Supreme Court case to address the qui tam provisions since the 1986 Amendments.
- b. Bly-Magee v. California, 236 F.3d 1014 (9th Cir. 2001). FCA claim viable without proof of government injury; state employees liable for acts beyond official duties.
- c. Searcy v. Philips Electronics North America Corp., 117 F.3d 154 (5th Cir. 1997). Federal Circuits split on government's unlimited right to veto qui tam settlements. See Killingsworth v. Northrop Corp., 25 F.3d 715 (9th Cir. 1994); United States ex rel Doyle v. Health Possibilities, P.S.C., 207 F.3d 335 (6th Cir. 2000).
- d. United States, ex rel. Dhawan v. New York City Health & Hosp. Corp., 2000 U.S. Dist. LEXIS 15,677 (S.D.N.Y. Oct. 27, 2000). Prior state court litigation resulted in public disclosure of FCA allegations.
- e. United States, ex rel. Summit v. Michael Baker Corp., 40 F. Supp. 2d 772 (E.D. Va. 1999) (the court held that a qui tam relator may settle his retaliation claim under the FCA).
- f. United States, ex rel. Stevens v. Vermont Agency of Natural Resources, 120 S.Ct. 1858 (2000) (A private individual may not bring suit in federal court on behalf of the United States against a state or state agency under the False Claims Act). See also Galvan v. Federal Prison Indus., Inc., 199 F.3d 461 (D.C. Cir. 1999) (Sovereign immunity bars qui tam suit against government corporation).
- g. Cook County v. United States ex rel. Chandler, 123 S. Ct. 1239 (2003) (2003) (a municipality is a "person" subject to suit under the FCA).

- h. United States, ex rel. Riley v. St. Luke's Episcopal Hospital, 196 F.3d 514 (5th Cir. 1999), *rev'd and remanded en banc*, 252 F.3d 749 (5th Cir. 2001) (qui tam does not violate the "Take Care" and separation of powers provisions of the Constitution).
- i. United States, ex rel Thorton v. Science Applications Int'l Corp., 207 F.3d 769 (5th Cir. 2000) (the value of administrative claims released by a contractor pursuant to a FCA settlement with the government are part of the settlement "proceeds" that the government must share with the relator).
- j. United States ex rel Holmes v. Consumer Insurance Group, 318 F.3d 1199 (10 Cir. 2003) (en banc) (federal employee could be a qui tam plaintiff).

X. ADMINISTRATIVE REMEDIES.

- A. Debarment and Suspension Basics. 10 U.S.C. § 2393; FAR Subpart 9.4.
 - 1. Suspension. Action taken by a suspending official to disqualify a contractor temporarily from Government contracting.
 - 2. Debarment. Action taken by a debarring official to exclude a contractor from Government contracting for a specified period.
 - 3. Government policy is to solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only.
 - 4. Debarment and suspension are discretionary administrative actions to effectuate this policy and shall not be used for punishment. FAR 9.103(a); FAR 9.402; United States v. Glymp, 96 F.3d 722, 724 (4th Cir. 1996).
 - 5. Debarring and suspending officials. DFARS 209.403. Any person may refer a matter to the agency debarring official. However, the absence of a referral will not preclude the debarring official from initiating the debarment or suspension process or from making a final decision. 64 Fed. Reg. 62984 (Nov. 18, 1999).

6. Debarments can be narrowly tailored to individuals, portions of a company, or to specific products that were the subject of the misconduct. FAR 9.406-1(b).

B. Debarment. Causes for debarment. FAR 9.406-2. DFARS 209.406-2.

1. Debarring official may debar a contractor for a **CONVICTION** of or **CIVIL JUDGMENT** for:
 - a. Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract.
 - b. Violation of federal or state antitrust statutes relating to the submission of offers.
 - c. Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.
 - d. Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor.
 - e. Criminal conviction for affixing “Made in America” labels to non-American goods.
 - f. Unfair trade practices.
2. Debarring official may debar a contractor, based upon a **PREPONDERANCE OF THE EVIDENCE** for:
 - a. Violation of the terms of a government contract or subcontract so serious as to justify debarment, such as
 - (1) Willful failure to perform in accordance with the terms of one or more contracts.

- (2) A history of failure to perform, or unsatisfactory performance of, one or more contracts.
- (3) Violation of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.
- (4) Any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor.

b. “Preponderance” means proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not. FAR 9.403. See Imco, Inc. v. United States, 33 Fed. Cl. 312 (1995).

C. Suspension. Causes for suspension. FAR 9.407-2.

1. Upon **ADEQUATE EVIDENCE** of:

- a. Commission of fraud or a criminal offense in connection with (i) obtaining, (ii) attempting to obtain, or (iii) performing a public contract or subcontract.
 - (1) Violation of federal or state antitrust statutes relating to the submission of offers.
 - (2) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.
 - (3) Violation of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181.
 - (4) Intentionally affixing a “Made in America” label to non-American goods.
 - (5) Unfair trade practices.

- (6) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a government contractor or subcontractor.
- b. “Adequate evidence” means information sufficient to support the reasonable belief that a particular act or omission has occurred. FAR 9.403.
- c. Indictment for any of the causes in paragraph a above constitutes “adequate evidence” for suspension. FAR 9.407-2.
- d. “Adequate evidence” may include allegations in a civil complaint filed by another federal agency. See SDA, Inc., B-253355, Aug. 24, 1993, 93-2 CPD ¶ 132.
- e. Upon adequate evidence, contractor may also be suspended for any other cause of so serious or compelling a nature that it affects the present responsibility of a government contractor or subcontractor. FAR 9.407-2.

D. Effect of Debarment or Suspension. FAR 9.405; DFARS 209.405.

- 1. As a result of § 2455 of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994), **FAR 9.401** provides for government-wide effect of the debarment, proposed debarment, suspension, or any other exclusion of an entity from procurement OR nonprocurement activities.
- 2. Contractors proposed for debarment, suspended, or debarred may not receive government contracts, and agencies may not solicit offers from, award contracts to, or consent to subcontracts with these contractors, unless acquiring agency’s head or designee determines that there is a compelling reason for such action.FAR 9.405(a).

3. The general rule is that absent a contrary determination by the ordering activity, debarment has no effect on the *continued performance* of contracts or subcontracts in existence at the time of the proposed or actual suspension or debarment. FAR 9.405-1. However, under DFARS 209.405-1, unless an agency head makes a compelling needs determination, DoD entities may not place orders exceeding guaranteed minimums under indefinite delivery contracts, nor may they place orders against Federal Supply Schedule contracts.
4. Bids received from any listed contractor are opened, entered on abstract of bids, and rejected unless there is a compelling reason for an exception.
5. Proposals, quotations, or offers from listed contractors shall not be evaluated, included in the competitive range, or discussions held unless there is a compelling reason for an exception.

E. Period of Debarment. FAR 9.406-4; DFARS 209.406-4.

1. Commensurate with the seriousness of the cause(s). Generally, debarment should not exceed three years except that debarment for violations of the Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, 102 Stat. 1481, may be for five years. FAR 23.506.
2. Administrative record must include relevant findings as to the appropriateness of the length of the debarment. Coccia v. Defense Logistics Agency, C.A. No. 89-6544, 1990 U.S. Dist. LEXIS 6079, (E.D. Pa. May 15, 1990). (Upholding 15-year debarment of former government employee convicted of taking bribes and kickbacks from contractors in exchange for contracts.)
3. The period of the proposed debarment, or any prior suspension, is considered in determining period of debarment.
4. Debarment period may be extended, but not solely on the original basis. If extension is necessary, normal procedures apply.
5. Period may be reduced (new evidence, reversal of conviction or judgment, elimination of causes, bona fide change in management).

6. Inconsistent treatment of corporate officials justifies overturning debarment decision. Kisser v. Kemp, 786 F. Supp. 38 (D.D.C. 1992).

F. Period of Suspension. FAR 9.407-4.

1. Suspension is temporary, pending completion of investigation or any ensuing legal proceedings.
2. If legal proceedings are not initiated within 12 months after the date of the suspension notice, terminate the suspension unless an Assistant Attorney General requests extension.
3. Extension upon request by an Assistant Attorney General shall not exceed 6 months.
4. Suspension may not exceed 18 months unless legal proceedings are initiated within that period.

XI. CONTRACTUAL REMEDIES.

A. Historical Right.

1. Under common law, where a party to a contract committed an act of fraud affecting a material element of the contract, the fraudulent act constituted a breach on the part of the party committing the act. The innocent party could then, at its election, insist on continuation of contract performance, or void the contract. Once voided, the voiding party would be liable under equity to the other party for any benefit received. Stoffela v. Nugent, 217 U.S. 499 (1910); Diamond Coal Co. v. Payne, 271 F. 362, 366 (App. D.C. 1921) (“equity refuses to give to the innocent party more than he is entitled to”).

2. Since the U. S. government was often viewed as acting in a “commercial capacity” when it engaged in commercial transactions, the rules of common law and equity applied to resolution of disputes. As such, if the government sought to rescind a contract, it was obligated to restore the contractor to the position it would be in, but-for the breach. Cooke v. United States, 91 U.S. 389, 398 (1875) (“If [the government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.”); Hollerbach v. United States, 233 U.S. 165 (1914); United States v. Fuller Co., 296 F. 178 (1923).
3. The Supreme Court rejected the general rule that the government should be treated like any other party to a contract when fraud. Pan American Petroleum and Transport Co., v. United States, 273 U.S. 456 (1927).
4. Courts and boards have developed an implied or common-law right to terminate or cancel a contract in order to effectuate the public policy of protecting the government in instances of procurement fraud. See United States v. Mississippi Valley Generating Co., 364 U.S. 520, reh’g denied 365 U.S. 855 (1961); Four-Phase Sys., Inc., ASBCA No. 26794, 86-2 BCA ¶ 18,924.
5. A contractor that engages in fraud in dealing with the government commits a material breach, which justifies terminating the entire contract for default. Joseph Morton Co., Inc. v. United States, 3 Cl. Ct. 120 (1983), aff’d 757 F.2d 1273 (Fed. Cir. 1985).

B. Denial of Claims.

1. Section 605(a) of the CDA prohibits an agency head from settling, compromising or otherwise adjusting any claim involving fraud. 41 U.S.C.S § 605(a). This limitation is reflected in FAR 33.210, which states that the authority of a contracting officer to decide or resolve a claim does not extend to the “settlement, compromise, payment, or adjustment of any claim involving fraud.” Subpart 33.209 of the FAR further provides that contracting officers must refer all cases involving suspected fraud to the agency official responsible for investigating fraud.

2. As a practical matter, the term “denial” is a misnomer in that the contracting officer is precluded from making a final decision on a contractor’s claim where fraud is suspected. As such, denial of a claim consists simply of doing nothing with the claim while other courses of action are pursued.
3. Denial of a claim should be viewed as simply the first of possibly many steps in the resolution of a fraudulent claim.

C. Counterclaims Under the CDA

1. Per 41 U.S.C. § 604: “[i]f a contractor is unable to support any part of his claim and it is determined that such inability is attributable to misrepresentation of fact or fraud on the part of the contractor, he shall be liable to the Government for an amount equal to such unsupported part of the claim in addition to all costs to the Government attributable to the cost of reviewing said part of his claim.”
2. Until recently, this provision of the CDA has been applied in only a small number of cases. This may in part be due to the deterrent effect of this statute. See United States ex. ral. Wilson v. North American Const., 101 F. Supp.2d 500, 533 (S.D. Tex 2000) (district court unwilling to enforce this provision of the CDA because there were “very few cases applying 41 U.S.C. 604”). See also UMC Elecs. v. United States, 249 F.3d 1337 (Fed. Cir. 2001); Larry D. Barnes, Inc. (d/b/a TRI-AD Constructors) v. United States, 45 Fed. Appx. 907 (Fed. Cir. 2002) (provision successfully applied by CAFC).
3. It is not possible to enforce this section of the CDA in litigation before the boards because of the language at 41 U.S.C. Section 605 (a), which states: “[t]he authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle or determine.” The boards have generally interpreted this language as meaning only Department of Justice (DOJ) has the authority to initiated a claim under this provision. This is because (in the eyes of the boards) only DOJ has the authority to administer or settle disputes involving fraud under the current statutory scheme. See TDC Management, DOT BCA 1802, 90-1 BCA ¶ 22,627.

D. Default Terminations Based on Fraud.

1. Where a contractor challenges the propriety of a default termination before a court or board, the government is not precluded under the CDA from introducing evidence of fraud discovered after the default termination, and using that evidence to support the termination in the subsequent litigation.
2. Some grounds for default termination.
 - a. Submission of falsified test reports. Michael C. Avino, Inc., ASBCA No. 317542, 89-3 BCA ¶ 22,156.
 - b. Submission of forged performance and payment bonds. Dry Roof Corp., ASBCA No. 29061, 88-3 BCA ¶ 21,096.
 - c. Submission of falsified progress payment requests. Charles W. Daff, Trustee in Bankruptcy for Triad Microsystems, Inc. v. United States, 31 Fed. Cl. 682 (1994).

E. Voiding Contracts Pursuant to FAR 3.7

1. Subpart 3.7 of the FAR establishes a detailed mechanism for voiding and rescinding contracts where there has been either a final conviction for illegal conduct in relation to a government contract, or an agency head determination of misconduct by a preponderance of the evidence.
2. Authority to void a contract pursuant to Subpart 3.7 of the FAR is derived from:
 - a. 18 U.S.C. § 218;
 - b. Executive Order 12448, 50 Fed. Reg. 23,157 (May 31, 1985); and,
 - c. Subsection 27(e)(3) of the Office of Federal Procurement Policy Act (41 U.S.C. § 423).

3. Under this FAR provision, a federal agency shall consider rescinding a contract upon receiving information that a contractor has engaged in illegal conduct concerning the formation of a contract, or there has been a final conviction for any violation of 18 U.S.C. §§ 201-224.
4. The decision authority for this provision is the agency head, which for DOD has been delegated to the Under Secretary of Defense (Acquisition, Technology, and Logistics).
5. No recorded cases of this provision of the FAR being applied.

F. Suspending Payments Upon a Finding of Fraud, FAR 32.006.

1. FAR 32.006 allows an agency head to reduce or suspend payments to a contractor when the agency head determines there is “substantial evidence that the contractor’s request for advance, partial, or progress payments is based on fraud.”
2. The authority of the agency head under this provision may be delegated down to Level IV of the Executive Schedule, which for the Department of the Army is the Assistant Secretary of the Army for Acquisition, Logistics, and Technology (ASA (ALT)).
3. This provision of the FAR is a potentially powerful tool in that the government can stay payment of a claim without the danger of a board treating the claim as a deemed denial, thus forcing the government into a board proceeding before the government’s case can be developed.
4. Only one recorded board decision involving this provision of the FAR. TRS Research, ASBCA No. 51712, 2001-1 BCA ¶ 31,149 (contracting officer suspended payment on invoices pending completion of an investigation involving fraud allegation, but failed to seek written permission from the agency head to take such action; ASBCA found the government in breach of the contract and sustained the appeal).

G. Voiding Contracts Pursuant to the Gratuities Clause, FAR 52.203-3.

1. Allows DOD to unilaterally void contracts upon an agency head finding that contract is tainted by an improper gratuity. Decision authority for the Department of the Army has been delegated to the ASA (ALT).
2. Authority stems from 10 U.S.C. § 2207, which requires the clause in all DOD contracts (except personal service contracts).
3. Considerable due process protections for the contractor.
4. Exemplary damages of between three to ten times the amount of the gratuity.
5. Procedures used very effectively in response to a fraudulent bidding scheme centered out of the Fuerth Regional Contracting Office, Fuerth, Germany. See Schuepferling GmbH & Co., ASBCA No. 45564, 98-1 BCA ¶ 29,659; ASBCA No. 45565, 98-2 BCA ¶ 29,739; ASBCA No. 45567, 98-2 BCA ¶ 29,828; Erwin Pfister General-Bauunternehmen, ASBCA Nos. 43980, 43981, 45569, 45570, 2001-2 BCA ¶ 31,431; Schneider Haustechnik GmbH, ASBCA Nos. 43969, 45568, 2001 BCA ¶ 31,264.

XII. BOARD'S OF CONTRACT APPEAL TREATMENT OF FRAUD.

A. Jurisdiction.

1. Theoretically, the boards are without jurisdiction to decide appeals tainted by fraud.
 - a. Under the CDA, "[e]ach agency board shall have jurisdiction to decide any appeal from a decision of a contracting officer (1) relative to a contract made by its agency, and (2) relative to a contract made by any other agency when such agency or the Administrator has designated the agency board to decide the appeal." 41 U.S.C. § 607(d).

- b. Because the CDA precludes contracting officers from issuing final decisions where fraud is suspected, and the boards only have jurisdiction over cases that can be decided by a contracting officer, the boards are effectively barred from adjudicating appeals involving fraud. See 41 U.S.C. § 605(a).
- c. As a practical matter, the boards exercise a form a de facto jurisdiction in that a decision concerning a motion to dismiss an appeal for fraud will have a dispositive effect on the case.

B. Dismissals, Suspensions and Stays.

- 1. Government must demonstrate that the possibility of fraud exists or that the alleged fraud adversely affects the Board's ability to ascertain the facts. Triax Co., Inc., ASBCA No. 33899, 88-3 BCA ¶ 20,830.
- 2. Mere allegations of fraud are not sufficient. General Constr. and Dev. Co., ASBCA No. 36138, 88-3 BCA ¶ 20,874. Four-Phase Systems, Inc., ASBCA No. 27487, 84-1 BCA ¶ 17,122.
- 3. Boards generally refuse to suspend proceedings except under the following limited circumstances:
 - a. When an action has been commenced in a court of competent jurisdiction, by the handing down of an indictment or by filing of a civil action complaint, so that issues directly relevant to the claim before the board are placed before that court;
 - b. When the Department of Justice or other authorized investigatory authority requests a suspension to avoid a conflict with an ongoing criminal investigation;
 - c. When the government can demonstrate that there is a real possibility that fraud exists which is of such a nature as to effectively preclude the board from ascertaining the facts and circumstances surrounding a claim; and

- d. When an appellant so requests to avoid compromising his rights in regard to an actual or potential proceeding. See Fidelity Constr., 80-2 BCA ¶ 14,819 at 73,142.

C. Fraud as an Affirmative Defense.

1. Most often, the government elects to treat fraud as a jurisdictional bar, and pursues the issue in a motion to dismiss.
2. When fraud is cited as an affirmative defense, the boards generally treat the issue consistent with cases where it is presented as a jurisdictional bar. See ORC, Inc. ASBCA No. 49693, 97-1 BCA ¶ 28,750.

XIII. CONCLUSION.

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CHAPTER 22

SELECTED LABOR STANDARDS

I. INTRODUCTION.

II. FAIR LABOR STANDARDS ACT OF 1938 (FLSA). 29 U.S.C. §§ 201-219; FAR Subpart 22.10.

A. Application.

1. The FLSA was the first federal wage-hour law having general applicability; its application is not limited to government contracts.
2. The FLSA covers employees engaged in interstate commerce and the production of goods for interstate commerce.

B. Purposes.

1. The statute specifies a federal minimum wage.
2. It requires payment of overtime wages.
3. The FLSA restricts the use of child labor.

III. CONTRACT WORK HOURS AND SAFETY STANDARDS ACT (CWHSSA). 40 U.S.C. §§ 327-333; FAR Subpart 22.3; FAR 22.403-3; DFARS Subpart 222.3.

A. Application.

1. Types of employees covered--laborers and mechanics.

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2. The CWHSSA applies to construction and service contracts in excess of \$100,000.
3. The CWHSSA usually does not apply to supply contracts. FAR 22.305(b).

B. Purposes.

1. CWHSSA establishes a forty-hour work week and requires the payment of overtime wages for public works and other covered contracts. See Maitland Bros. Inc., ENG BCA No. 5782, 94-1 BCA ¶ 26,473.
2. CWHSSA specifies health and safety requirements.

C. Government Policy. It is government policy that contractors perform without using overtime. FAR 22.103-2. The government will not reimburse the contractor for overtime payments unless the contracting officer determines that overtime is in the government's interest. FAR 52.222-2. Consult agency regulations for guidance on disposition of withheld funds. See, e.g., Defense Finance and Accounting Service-Indianapolis Regulation 37-1, ch. 9, para. 092028.B.2 [hereinafter DFAS-IN 37-1].

IV. COPELAND (ANTI-KICKBACK) ACT. 18 U.S.C. § 874; 40 U.S.C. § 276c; 29 C.F.R. Part 3; FAR 22.403-2.

A. Application.

1. The Anti-Kickback Act protects the wages of any person engaged in the construction or repair of a public building or public work (including projects that are financed at least in part by federal loans or grants).
2. The Act requires prime contractors and subcontractors to submit a weekly statement of compliance pertaining to the wages paid to each employee during the preceding week. FAR 22.403-2; FAR 52.222-10.

B. Purpose. The Act prohibits employers from exacting “kickbacks” from employees as a condition of employment.

- C. Recordkeeping Requirements. The Anti-Kickback Act requires contractors and subcontractors to submit weekly payroll reports and statements of compliance. Both the contractors and the agency must keep these records for three years after completion of the contract. FAR 22.406-6.

V. DAVIS-BACON ACT (DBA). 40 U.S.C. §§ 3141-3144; 29 C.F.R. Part 5; FAR Subpart 22.4; DFARS Subpart 222.4.

A. Statutory Requirements. 40 U.S.C. § 3142; FAR 22.403-1.

1. Contractors must pay mechanics and laborers a “prevailing wage rate” on federal construction projects performed in the United States that exceed \$2,000.
2. The prevailing wage rate is the key to the Davis-Bacon labor standards. The Department of Labor determines the minimum wage, which normally is based on the wage paid to the majority of a class of employees in an area. 29 C.F.R. § 1.2 (1999).
 - a. A wage determination is not subject to review by the Government Accountability Office or boards of contract appeals. See American Fed’n of Labor - Congress of Indus. Org., Bldg., and Constr. Trades Dep’t, B-211189, Apr. 12, 1983, 83-1 CPD ¶ 386; Woodington Corp., ASBCA No. 34053, 87-3 BCA ¶ 19,957; but see Inter-Con Sec. Sys., Inc., ASBCA No. 46251, 95-1 BCA ¶ 27,424 (finding board has jurisdiction to consider effect of wage rate determination on contractual rights of a party).
 - b. “Wages” under the terms of the DBA include the basic hourly pay rates plus fringe benefits.

B. Application. FAR 22.402.

1. The DBA applies to federal contracts involving construction of public buildings or public works.
 - a. “Public building” or “public work” means a construction or repair project that is carried on by the authority, or with the funds, of a federal agency to serve the interests of the general public.

- b. The DBA applies only to construction activity performed by laborers or mechanics directly on the “site of the work.” Until recently, the geographical confines of the “site of the work” has been a fluid concept. See L.P. Cavett Co. v. Dep’t of Labor, 101 F.3d 1111 (6th Cir. 1996); Ball, Ball, and Brossamer, Inc. v. Reich, 24 F.3d 1447 (D.C. Cir 1994), rev’g Ball, Ball, and Brossamer, Inc. v. Martin, Sec’y of Labor, 800 F. Supp. 967 (D.D.C. 1992); see also Bechtel Constructors Corp., DOL ARB No. 95-045A, July 15, 1996. DOL finally changed its regulations in response to these decisions in late 2000. See 65 Fed. Reg. 80,268 (Dec. 20, 2000) (amending 5 CFR §§ 5.2j and 5.2i). In 2005, FAR subpart 22.4 was amended to implement the DOL rules.
- c. “Site of the work” now means (FAR 22.401):
- (1) The primary site of the work. The physical place or places where the construction called for in the contract will remain when on it is completed; and
 - (2) The secondary site of the work, if any. Any other site located in the U.S. where a significant portion of the building or work is constructed, if it is established specifically for the performance of the contract or project.
 - (3) This definition includes fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., provided that they are: (1) dedicated exclusively (or nearly so) to performance of the contract or project, and (2) adjacent (or virtually adjacent) to the primary or secondary site of the work.
- d. Transportation of materials to and from the site is not considered “construction” covered by the DBA. See 65 Fed. Reg. 80,268 (Dec. 20, 2000) (amending 29 C.F.R. § 5.2(j) (1)(iv) and 5.2(j)(2)); Building & Constr. Trades Dep’t, AFL-CIO v. Department of Labor Wage Appeals Board, 932 F.2d 985 (D.C. Cir. 1991), rev’g 747 F. Supp. 26 (D.D.C. 1990). Transportation of materials within the site of the work (e.g., between the primary and secondary sites) is considered “construction” covered by the DBA. FAR 22.401.

2. Dual Coverage. See FAR 22.402(b); DFARS 222.402-70.

- a. The DBA also may apply to construction work performed under a non-construction contract, e.g., installation support contracts. Apply DBA standards if the contract requires a substantial and segregable amount of construction, repair, painting, alteration, or renovation.
- b. The DBA applies to repairs but not to maintenance. The DFARS provides a bright line test to determine whether work is maintenance (Service Contract Act work) or repair (Davis-Bacon Act work). If a service order requires 32 or more work hours, the work is “repair.” Otherwise, consider the work to be “maintenance.” For painting, the work is subject to the DBA if the service order requires painting of 200 square feet or more, regardless of work hours.

3. Non-Dual Coverage. The DBA does not apply to construction work to be performed as part of non-construction contracts, if:

- a. The construction work is incidental to other contract requirements; or
- b. The construction work is so merged with nonconstruction work, or so fragmented in terms of the locations or time spans in which it is to be performed, that it cannot be segregated as a separate contractual requirement.

C. Employees Covered and Exempted. 29 C.F.R. § 5.2(m) (1999); FAR 22.401.

1. “Laborers or mechanics” are covered, including:

- a. Manual laborers employed by a contractor or subcontractor at any tier. Cf. Ken’s Carpets Unlimited v. Interstate Landscaping, Inc., 37 F.3d 1500 (6th Cir. 1994) (non-precedential) (holding prime contractor alone responsible for DBA wages where prime failed to include proper clauses in subcontract); and
- b. Working foremen who devote more than 20 percent of their time during a workweek to performing duties as a laborer or mechanic.

2. Office workers, superintendents, technical engineers, scientific workers, and other professionals, executives, and administrative personnel are exempt. 29 C.F.R. Part 541.
- D. Types of Wage Determinations. 29 C.F.R. § 1.6 (1999); FAR 22.404-1.
1. General Wage Determinations. 29 C.F.R. §§ 1.5(b) and 1.6(a)(2) (1999); FAR 22.404-1(a). A general wage determination contains prevailing wage rates for the types of construction specified in the determination, and is used in contracts performed within a specified geographical area. General wage determinations remain valid until modified or canceled by the Department of Labor.
 2. Project Wage Determinations. 29 C.F.R. § 1.6(a)(1) (1999); FAR 22.404-1(b).
 - a. The contracting officer uses a project wage determination when no general wage determination applies to the work. The determination is effective for 180 calendar days from the date of its issuance. Once incorporated into a contract, the project wage determination is effective for the duration of that contract.
 - b. If the project wage determination expires, the contracting officer must follow special procedures; these vary depending on whether the activity contracted by sealed bidding or negotiation. FAR 22.404-5.
- E. Procedures for Obtaining Wage Determinations. FAR 22.404-3.
1. General requirements.
 - a. If a general wage determination is applicable to the project, the agency may use it without notifying DOL. These wage determinations are available on the the Wage Determinations OnLine.gov (WDOL) website (<http://www.wdol.gov>).
 - b. If necessary, a contracting officer may request that DOL establish a recurring general wage determination.

- c. A contracting officer may request a project wage determination from DOL by specifying the location of the project and including a detailed description of the types of construction involved and the estimated cost of the project.
 - d. Processing time for wage rate determinations is at least 30 days.
 - e. DOL (Wage and Hour Division) defines types of construction for use in selecting proper wage rate schedules. FAR 22.404-2(c).
- 2. If possible, the contracting officer must include the proper wage rate determination in each solicitation covered by the DBA.
 - a. Solicitations issued without a wage rate determination must advise that the contracting officer will issue a schedule of minimum wage rates as an amendment to the solicitation. FAR 22.404-4(a). If an offeror fails to acknowledge an amendment to an IFB that adds or modifies a wage rate, the offer may be nonresponsive. ABC Project Mgmt., Inc., B-274796.2, Feb. 14, 1997, 97-1 CPD ¶ 74.
 - b. If the activity uses sealed bidding, it may not open bids until a reasonable time after furnishing the wage determination to all bidders.
 - c. In negotiated acquisitions, the contracting officer may open the proposals and conduct negotiations before obtaining the wage determination, but must include the wage determination in the solicitation before calling for final proposal revisions. FAR 22.404-4(c).
- F. Failure to Incorporate a Wage Determination. If the contracting officer fails to incorporate a wage determination in a contract upon award, the contracting officer must:
 - 1. Modify the contract to incorporate the required wage rate determination, retroactive to the date of award, and equitably adjust the contract price, if appropriate. FAR 22.404-9(b)(1). See BellSouth Comm. Sys., Inc., ASBCA No. 45955, 94-3 BCA ¶ 27,231; or

2. Terminate the contract. FAR 22.404-9(b)(2). Sunspot Garden Ctr. & Country Craft Gift Shop, B-237065.2, Feb. 26, 1990, 90-1 CPD ¶ 224.

G. Modifications of Wage Determinations. FAR 22.404-6.

1. DOL may modify a general or project wage determination. The requirement to include a modification in a solicitation or contract depends upon when the agency "receives" notice (actual or constructive) of the modification and the method of acquisition.
 - a. General determinations. Receipt by the agency of actual written notice, or constructive notice (publication on the WDOL).
 - b. Project determinations. Actual receipt by the agency.
2. Sealed Bidding. FAR 22.404-6(b).
 - a. Before bid opening, a modification is effective if:
 - (1) The contracting agency actually receives it, or DOL publishes notice of the modification on the WDOL, 10 or more calendar days before the bid opening date; or
 - (2) The contracting agency actually receives it, or DOL publishes notice on the WDOL, less than 10 calendar days before the date of bid opening, unless the contracting officer finds there is insufficient time before bid opening to notify prospective bidders.
 - b. A modification to a general wage determination published on the WDOL after bid opening but before award is not effective, unless award is not made within 90 days after bid opening. FAR 22.404-6(b)(6). See Twigg Corp. v. General Servs. Admin., GSBICA No. 14639, 99-1 BCA ¶ 30,217 (holding contractor entitled to an equitable adjustment where agency failed to incorporate revised wage determination).

- c. If the contracting officer receives an effective modification of the wage determination for the primary site of the work before bid opening, the contracting officer must postpone the bid opening, if necessary, and permit bidders to amend their bids. FAR 22.404-6(b)(3).
 - d. If the contracting officer receives an effective modification of the wage determination for the primary site of the work after bid opening, but before award, the contracting officer must:
 - (1) Award the contract and incorporate the new determination to be effective on the date of contract award; or
 - (2) Cancel the solicitation in accordance with FAR 14.401-1.
 - e. If the contracting officer receives an effective modification after award, the contracting officer must modify the contract to incorporate the wage modification retroactive to the date of award and equitably adjust the contract price. FAR 22.404-6(b)(5).
3. Contracting by Negotiation. FAR 22.404-6(c).
- a. Any modification of a wage determination received by the contracting agency or published on the WDOL before award is effective. FAR 22.404-6(c)(1).
 - b. If the contracting officer receives an effective modification before award, the contracting officer must amend the solicitation to incorporate the new wage determination and give all prospective offerors who were sent solicitations (or all offerors who submitted proposals if the closing date has passed) a reasonable opportunity to revise their proposals FAR 22.404-6(c)(2).
 - c. If the contracting officer receives an effective modification after award, the contracting officer must modify the contract to incorporate the rate modification retroactive to the date of award and equitably adjust the contract price. FAR 22.404-6(c)(3).

H. Contract Administration--Compliance Checks and Investigations.

1. The contracting officer must make checks and conduct investigations to ensure compliance with the DBA requirements. FAR 22.406-7; DFARS 222.406-1.
2. Regular compliance checks include:
 - a. Employee interviews;
 - b. On-site inspections;
 - c. Payroll reviews; and
 - d. Comparison of information gathered during checks with available data, e.g., inspector reports and construction activity logs.
3. The contracting officer must conduct special compliance checks when inconsistencies, errors, or omissions are discovered during regular checks or if complaints are filed.
4. Labor Standards Investigations. FAR 22.406-8; DFARS 222.406-8.
 - a. The contracting agency investigates when compliance checks indicate that violations are substantial in amount, willful, or uncorrected. The DOL also may perform or request an investigation.
 - b. The contracting officer notifies the contractor of preliminary findings, proposed corrective actions, and certain contractor rights. FAR 22.406-8(c).
 - c. The contracting officer forwards a report to the agency head who, in certain cases, must forward it to DOL. If the contracting officer finds substantial evidence of criminal activity, the agency head must forward the report to the U.S. Attorney General.

I. Withholding and Suspending Contract Payments. FAR 22.406-9.

1. The contracting officer shall withhold contract payments if the contracting officer believes a violation of the DBA has occurred, or upon request by the DOL. 29 C.F.R. § 5.5(a)(2)(1999); FAR 22.406-9(a)(1) (allowing cross-withholding). See M.E. McGeary Co., ASBCA No. 36788, 90-1 BCA ¶ 22,512; see also DFAS-IN 37-1, ch. 9, para. 092028.B.1. (prescribing procedures for disposition of withheld funds). See Westchester Fire Insurance Co., v. United States, 52 Fed. Cl. 57 (2002), (although contract terminated five months before, contracting officer was required to withhold funds pursuant to DOL request).
2. The contracting officer shall suspend any further payment, advance, or guarantee of funds otherwise due to a contractor if a contractor or subcontractor fails or refuses to comply with the DBA.

J. Disputes Relating to DBA Enforcement. FAR 22.406-10; FAR 52.222-14.

1. The DOL settles labor disputes that are not resolved at the local level. Labor disputes are not reviewable under the Disputes clause. Emerald Maint., Inc. v. United States, 925 F.2d 1425 (Fed. Cir. 1991); Page Constr. Co., ASBCA No. 39685, 90-3 BCA ¶ 23,012; M.E. McGeary Co., supra.
2. Boards of contract appeals and courts review claims relating to labor disputes if the dispute is based on the contractual rights and obligations of the parties. See, e.g., MMC Constr., Inc., ASBCA No. 50,863, 99-1 BCA ¶ 30,322 (assuming jurisdiction over claim for excessive DBA wage withholding); Commissary Servs. Corp., ASBCA No. 48613, 97-1 BCA ¶ 28,749 (assuming jurisdiction over dispute regarding DBA offset when ultimate issue was whether same prime contractor was involved in both contracts); American Maint. Co., ASBCA No. 42011, 92-2 BCA ¶ 24,806 (assuming jurisdiction over contractor's claim for reimbursement of fringe benefits); Central Paving, Inc., ASBCA No. 38658, 90-1 BCA ¶ 22,305 (assuming jurisdiction over claim that original wage rate information in contract was incorrect). Cf. Page Constr. Co., ASBCA No. 39685, 90-3 BCA ¶ 23,012 (declining jurisdiction over claim that government breached statutory obligation).
3. Federal district courts have jurisdiction to review DOL's implementation of the DBA, i.e., district courts entertain appeals from DOL decisions. See, e.g., Building and Constr. Trades Dep't, AFL-CIO v. Secretary of Labor, 747 F. Supp. 26 (D.D.C. 1990).

VI. MCNAMARA-O'HARA SERVICE CONTRACT ACT OF 1965 (SCA). 41 U.S.C. §§ 351-358; 29 C.F.R. Part 4; FAR Subpart 22.10; DFARS Subpart 222.10.

A. Statutory Requirements.

1. Contractors performing any service contract shall pay their employees not less than the FLSA minimum wage.
2. Service contracts over \$2,500 shall contain mandatory provisions regarding minimum wages and fringe benefits, safe and sanitary working conditions, notification to employees of the minimum allowable compensation, and equivalent federal employee classifications and wage rates. However, even if omitted from the solicitation, the SCA and applicable wage determinations are binding on contractors. Kleenco, Inc., ASBCA No. 44348, 93-2 BCA ¶ 25,619; Miller's Moving Co., ASBCA No. 43114, 92-1 BCA ¶ 24,707.
3. For contracts over \$2,500, the minimum wage and fringe benefits are based on either:
 - a. Wage and fringe benefit determinations issued by DOL (FAR 22.1002-2), or
 - b. Wages and fringe benefits established by a predecessor contractor's collective bargaining agreement (CBA). 29 C.F.R. §§ 4.5 and 4.152 (1999); FAR 22.1002-3.

B. Application. FAR 22.1002; FAR 22.1003. The SCA applies to:

1. Service contracts.
 - a. "Service contract" means any federal contract, except as exempted by the SCA, the principal purpose of which is to furnish services through the use of service employees. 29 C.F.R. § 4.111 (1999); FAR 22.1001. See Ober United Travel Agency, Inc. v. United States Department of Labor, 135 F.3d 822 (D.C. Cir. 1998) (holding that SCA applies to concession contracts for travel services).

- b. The SCA applies only to service contracts performed in the United States. 29 C.F.R. § 4.112(a) (1999); FAR 22.1003-2. “United States” includes any state, the District of Columbia, Puerto Rico, and certain possessions and territories.
 - c. The SCA does not apply if the principal purpose of a contract is to provide something other than services of the character contemplated by the SCA. Further, the SCA is not applicable to services performed incidentally to a non-service contract. J.L. Assocs., B-236698.2, Jan. 17, 1990, 90-1 CPD ¶ 60. See Westbrook Indus., Inc., B-248854, Sept. 28, 1992, 92-2 CPD ¶ 213 (finding reasonable an agency determination that rental of washers and dryers was not subject to SCA).
 - 2. Performed by service employees.
 - a. The SCA applies only to service employees. “Service employee” means any person engaged in the performance of a service contract or subcontract, other than persons employed in bona fide executive, administrative, or professional capacities. 29 C.F.R. § 4.113 (1999); FAR 22.1001. See 29 C.F.R. Part 541 (defines executives, professionals, and others).
 - b. The term “service employee” includes all nonexempt persons engaged in the performance of a service contract regardless of any contractual relationship alleged to exist between a contractor or subcontractor and such persons. 29 C.F.R. §§ 4.113 and 4.155 (1999); FAR 22.1001.
- C. Statutory Exemptions and Dual Coverage Under the Service Contract Act. 41 U.S.C. § 356; 29 C.F.R. §§ 4.115 to 4.122 (1999); FAR 22.1003-3.
 - 1. Davis-Bacon Act (DBA) coverage.
 - a. The SCA does not apply if the principal purpose of a contract is to obtain construction work. In such a situation, the DBA covers all work done under the contract, including any incidental service-type work.

- b. Dual Coverage. The DBA requires contracting officers to incorporate DBA provisions and clauses into a service contract if there is a substantial amount of segregable construction work.
 - 2. Walsh-Healy Public Contracts Act of 1938 (WHA) coverage.
 - a. The SCA does not apply if the principal purpose of the contract is the manufacture or delivery of supplies, materials, or equipment.
 - b. Dual Coverage. Some work under a service contract may be exempt from the SCA because it entails the manufacture or delivery of supplies, materials, or equipment.
 - 3. Miscellaneous statutory exemptions. See FAR 22.1003-3.
- D. Administrative Variances and Exemptions.
- 1. The DOL may establish reasonable variations, tolerances, and exemptions from SCA provisions. 41 U.S.C. § 353(b).
 - 2. Requirements exempted from SCA coverage by the DOL are found at 29 C.F.R. § 4.123 (1999) and FAR 22.1003-4.
 - 3. Rules for Commercial Items Contracts.
 - a. Under very limited circumstances, contracts and subcontracts for certain types of commercial services may be exempted from SCA coverage. See 66 Fed. Reg. 5,327 (Jan. 19, 2001) (amending 29 CFR § 4.123(e)).
 - b. Eight categories of services are potentially exempt under the new rule. 29 CFR §§ 4.123(e)(1) and (e)(2)(i) (2001).
 - c. The exemption applies only when all of seven criteria are satisfied. 29 CFR § 4.123(e)(2)(ii) (2001).

E. Compensation Standards Under the SCA.

1. Regardless of the amount of a contract or subcontract, a contractor or subcontractor on a contract covered by the SCA must pay service employees at least the minimum wage specified by the FLSA. 29 C.F.R. §§ 4.159 and 4.160 (1999); FAR 22.1002-4.
2. Service contracts over \$2,500. 29 C.F.R. §§ 4.161 through 4.163 (1999); FAR 22.1002-2.
 - a. A contractor must pay service employees not less than the wage rate issued by DOL for the contract. See General Sec. Servs. Corp., B-280959, Dec. 11, 1998, 98-2 CPD ¶ 143 (holding that agencies may require offerors to propose rates greater than the DOL wage determination). Cf. Ashford v. United States, 43 Fed. Cl. 1 (1997) (holding contractor bound by CBA rates incorporated in contract, even though the CBA was void).
 - b. If there is no wage determination or effective CBA, the FLSA minimum wage applies.

F. Obtaining Wage Determinations. FAR 22.1007 and 22.1008; DFARS 222.1008; 29 C.F.R. § 4.143 (1999); <http://www.wdol.gov>.

1. The contracting officer must obtain wage determinations for:
 - a. Each new solicitation and contract exceeding \$2,500;
 - b. A contract modification that increases the contract to over \$2,500;
 - c. An extension of the contract pursuant to an option clause or otherwise; or
 - d. Changes to the scope of a contract that affect labor requirements significantly.
2. On multiple year contracts in excess of \$2,500, the contracting officer must obtain a wage determination annually if funding is annual, or biennially if funding is not subject to annual appropriations.

3. Wage determinations (WD) are now obtained on-line from the Wage Determinations OnLine.gov (WDOL) website, at: <http://www.wdol.gov>. FAR 22.1008-1 (effective 28 June 2006).
4. If a contracting officer cannot obtain an appropriate SCA WD within the WDOL database for use in a contract action, the contracting officer must request an official SCA WD from DOL by completing the “e98” (an electronic version of the old SF 98), which is accessible on the WDOL website. FAR 22.1008-1(a).
5. If the “successor contract” rule applies (see para. G *infra*), the contracting officer may use the WDOL website to prepare a wage determination referencing the agreement and incorporate that wage determination, attached to a complete copy of the collective bargaining agreement, into the successor contract action. FAR 22.1008-2(d).

G. “Successor Contract” Rule.

1. If an activity competes a new contract for substantially the same services and the contract is to be performed in the same locality, the successor contractor must pay wages and fringe benefits at least equal to those contained in a CBA effective under the previous contract. 29 C.F.R. § 4.163 (1999); FAR 22.1008-3(b). See Klate Holt Co. v. International Bhd. of Elec. Workers, 868 F.2d 671 (4th Cir. 1989); Professional Servs. Unified, Inc., ASBCA No. 45799, 94-1 BCA ¶ 26,580.
2. A new CBA will not apply to the follow-on contract if:
 - a. The incumbent enters into a CBA that will not be effective until after the incumbent’s contract expires;
 - b. The agency has timely notified the incumbent contractor and bargaining agent of the applicable acquisition dates, but the agency has not received timely notice of the terms of a new CBA. FAR 22.1008-3(c); see, Tecom, Inc., ASBCA No. 51591, 2001-1 BCA ¶ 31,156; or
 - c. DOL determines that the CBA was not negotiated in good faith or that the rates set by the CBA vary substantially from the prevailing rates. FAR 22.1008-3(e); see Vigilantes, Inc. v. United States, 968 F.2d 1412 (1st Cir. 1992).

3. The “Successor Contract” rule applies only to the base period of the follow-on contract. After the base period, the contractor and the employee bargaining unit may renegotiate the CBA. Per the regulations, each option period, for example, is considered a new contract. 29 C.F.R. §§ 4.143; 4.145 (1999). See Fort Hood Barbers Assn. v. Herman, 137 F.3d 302 (5th Cir. 1998) (contractor required to pay wages no less than those in the preceding contract’s CBA only for the first two years of a follow-on multi-year contract); but see American Maritime Officers v. Hart, No. 99-1054 (D.D.C. Oct. 14, 1999) (unpub.) (predecessor contractor’s CBA applied to the entire term of a follow-on multiyear contract).

Comment [T.H.1]: Watch for possible regulatory changes to this part of the CFR or an appeal of American Maritime by DOL to the D.C. Circuit

H. Right of First Refusal. See Executive Order 12,933; 59 Fed. Reg. 53,559 (1994).

1. Until 17 February 2001, a successor contractor on a contract for maintenance of public buildings was required by Executive Order 12,933 to offer the predecessor contractor’s employees a right of first refusal for positions the employees are qualified for. This right applied only to “public buildings,” and did not include buildings on military installations.
2. **The requirements of Executive Order 12,933 were revoked by Executive Order 13,204, 66 Fed. Reg. 11,228 (2001).**

I. Price Adjustments for Wage Rate Increases. FAR 52.222-43; 52.222-44.

1. If the FLSA minimum wage rate is amended or a wage rate incorporated upon exercise of an option increases labor costs, the contractor is entitled to a price adjustment. Adjustments are allowed only for increases due to congressional or DOL action. See United States v. Serv. Ventures, Inc., 899 F.2d 1 (Fed. Cir. 1990); Williams Servs., Inc., ASBCA No. 41121, 91-1 BCA ¶ 23,486; see also Gricoski Detective Agency, GSBCA No. 8901, 90-3 BCA ¶ 23,131 (disallowing adjustment because contract included priced option years and contractor failed to factor vacation pay costs into option year prices). Cf. Sterling Servs., Inc., ASBCA No. 40475, 91-2 BCA ¶ 23,714 (allowing partial relief on claim arising from corrected wage determination).

- a. Adjustments for increased wages arising out of a CBA negotiated during contract performance are not retroactive to date of CBA execution. Adjustments in these cases are required only upon option exercise. See Ameriko, Inc., d/b/a Ameriko Maint. Co., ASBCA No. 50356, 98-1 BCA ¶ 29,505 (holding contractor was not entitled to price adjustment for increase in base year wages where increase was due to CBA executed after contract award); Classico Cleaning Contractors, Inc., DOTBCA No. 2786, 98-1 BCA ¶ 29,648 (holding contractor could not recover during first option year for increases under CBA executed during same year). Phoenix Management, Inc., ASBCA No. 53409, 02-1 BCA ¶ 31,704 (agency required to comply with DOL wage determination because contracting officer failed to seek clarification regarding employees included in the CBA).
 - b. A contractor is not entitled to a price adjustment for the increased costs of complying with a wage determination that existed at the time of contract award. Holmes & Narver Servs., ASBCA No. 40111, 93-3 BCA ¶ 26,246 (holding contractor could not recover cost of complying with wage determination that had not changed). See Johnson Controls World Servs., Inc., ASBCA No. 40233, 96-2 BCA ¶ 28,548 (agency not liable for failing to inform contractor of previously disapproved conformance request).
2. Recovery under the price adjustment clauses is limited to the types of costs set forth expressly therein. See FAR 52.222-43; FAR 52.222-44 (limiting recovery to wages, fringe benefits, social security and unemployment taxes, and workers' compensation insurance); see also All Star/SAB Pacific, J.V., ASBCA No. 50,856, 98-2 BCA ¶ 29,958 (holding state excise taxes occasioned by a wage rate increase were not compensable).
 3. Not all adjustments for increased wage rates, however, are made under the FAR "price adjustment" clauses. If a contractor shows that recovery is based on a clause other than a price adjustment clause, e.g., changes clause, the price adjustment clause limitations are inapplicable.
 - a. The parties may agree to wage revisions outside the terms of the price adjustment clauses. Security Servs. Inc. v. General Servs. Admin., GSBCA No. 11052, 93-2 BCA ¶ 25,667.

Comment [T.H.2]: In Security Servs., KO allowed an adjustment to compensate a contractor for wage increases that occurred before the exercise of an option year. Under terms of the contract, adjustments were to be made upon exercise of the option, but clauses did not prohibit early adjustments.

- b. The price adjustment clauses may not apply where the adjustment occurred during base year of contract and was not due to a FLSA minimum wage increase. See, e.g., Lockheed Support Sys., Inc. v. United States, 36 Fed. Cl. 424 (1996) (holding that price adjustment clause did not apply to a wage rate price adjustment made four months after the start of a contract); Professional Servs. Unified, Inc., ASBCA No. 45799, 94-1 BCA ¶ 26,580 (price adjustment clause inapplicable where adjustment occurred after contract award).

Comment [T.H.3]: Professional Services also a case where the parties agreed that there was a mutual mistake of fact concerning which wage rate applied to the contract. The argument in this case was not over whether the government owed some money, it was over whether contractor was to recover under the price adjustment clause (limited) or the Changes clause (unlimited, generally).

4. Mutual mistake concerning employee classification or the propriety of a wage determination may shift the cost burden to the government. See, e.g., Richlin Sec. Serv. Co., DOTBCA Nos. 3034, 3035, 98-1 BCA ¶ 29,651 (mutual mistake as to employee classification).

VII. WALSH-HEALEY PUBLIC CONTRACTS ACT OF 1936 (WHA). 41 U.S.C. §§ 35-45; 41 C.F.R. Parts 50-201 to 50-210; FAR Subpart 22.6; DFARS Subpart 222.6.

- A. Section 7201 of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994), eliminated the requirement that contractors must be a regular dealer or manufacturer of the items to be furnished under a contract. See Federal Acquisition Circular 97-1, 62 Fed. Reg. 44,802 (1997).
- B. What is Left?
1. Wage Rate Determinations. 41 U.S.C. § 35(a). Under the WHA, DOL determines the prevailing minimum wages based on similar wages in the applicable industry and locale in which the supplies are to be manufactured or furnished under a contract. 41 U.S.C. § 35(b). Presently, however, there is no wage rate determination activity under the Act. The FLSA minimum wage is the Walsh-Healey Act wage rate.
 2. Overtime Provisions. 41 U.S.C. § 35(b).
 3. Child and Convict Labor. 41 U.S.C. § 35(c).
 4. Health and Safety Requirements. 41 U.S.C. § 35(d).

VIII. REMEDIES FOR LABOR STANDARDS VIOLATIONS.

A. Termination for Default.

1. WHA - 41 U.S.C. § 36.
2. DBA - 40 U.S.C. § 276a-1. See Kelso v. Kirk Bros. Mech. Contractors, Inc., 16 F.3d 1173 (Fed. Cir. 1994); Quality Granite Constr. Co., ASBCA No. 43846, 93-3 BCA ¶ 26,073, aff'd sub nom Quality Granite Constr. Co. v. Aspin, 26 F.3d 138 (Fed. Cir. 1994)(non-precedential); Glazer Constr. Co., Inc., v. U.S., COFC No. 98-400C May 7 2002.
3. SCA - 41 U.S.C. § 352(c).
4. CWHSSA - 40 U.S.C. § 333(b) (after DOL makes a determination of noncompliance).

B. Debarment.

1. WHA - 41 U.S.C. § 37; 41 C.F.R. § 50-203.1 (1999) (violation of stipulations or representations of the Act).
2. DBA - 40 U.S.C. § 276a-2(a); 29 C.F.R. § 5.12 (1999) (for disregard of its obligations to employees or subcontractors under the Act).
3. SCA - 41 U.S.C. § 354(a) (providing that absent unusual circumstances, no contract shall be awarded to contractors who violate the SCA). See 29 C.F.R. § 4.188(b)(3) (i)-(ii); Dantran Inc. v. Department of Labor, 171 F.3d 58 (1st Cir. 1999) (holding debarment unwarranted for SCA violation where mitigating circumstances and no aggravating factors were present).
4. CWHSSA - 40 U.S.C. § 333; 29 C.F.R. § 5.12 (1999) (for aggravated or willful violation).

C. Withholding Contract Funds.

1. WHA - 41 U.S.C. § 36 (held in account and paid directly to employees on order of DOL).
2. DBA - 40 U.S.C. § 3142(c)(3) (turned over to GAO, which may pay employees directly). For a discussion of the constitutionality of such withholding, see Lujan v. G&G Fire Sprinklers, Inc., 121 S. Ct. 1446 (2001) (withholding of contract funds pursuant to State “Little Davis-Bacon Act” statute, without providing the right to a hearing, does not violate 14th Amendment right to due process).
3. SCA - 41 U.S.C. § 352(a); 29 C.F.R. § 4.187 (1999) (turned over to DOL on order); Castle Bldg. Maint., Inc., GSBCA No. 10003, 90-3 BCA ¶ 23,271; National Sec. Serv. Co., DOT CAB No. 1033, 80-1 BCA ¶ 14,268. See Jeanneate M. Bailey v. Dep’t of Labor, 810 F. Supp. 261 (Alaska D.C., 1993) (contracting officer’s withholding of underpaid SCA wages arising under another contract was unconstitutional denial of contractor’s due process).
4. CWHSSA - 40 U.S.C. § 328(b)(2) (held in account and paid directly to employees).

D. Liquidated Damages (\$10.00 a day for each employee paid improperly).

1. WHA - 41 U.S.C. § 36.
2. DBA/SCA (per CWHSSA) - 40 U.S.C. § 328(b)(2); United States v. Munsey Trust Co., 332 U.S. 234 (1947); To the Secretary of the Air Force, B-123227, 48 Comp. Gen. 387 (1968).

IX. CONCLUSION.

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CHAPTER 23

CONSTRUCTION CONTRACTING

I. INTRODUCTION. Following this block of instruction, students should:

- A. Understand the unique clauses and procedures used in construction contracting.
- B. Understand how to analyze common legal issues that arise in construction contracting.

II. REFERENCES.

- A. Federal Regulations.
 - 1. Federal Acquisition Regulation (FAR) Part 36.
 - 2. Defense Federal Acquisition Regulation Supplement (DFARS) Part 236.
 - 3. Army Federal Acquisition Regulation Supplement (AFARS) Part 5136.
 - 4. Air Force Federal Acquisition Regulation Supplement (AFFARS) Part 5336.
 - 5. Navy Acquisition Procedures Supplement (NAPS) Part 5236.
- B. Army Regulations (AR).
 - 1. AR 210-50, Housing Management (26 Feb 1999).

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2. AR 415-15, Army Military Construction and Nonappropriated-Funded Construction Program Development and Execution, (12 June 2006) [hereinafter AR 415-15].
3. AR 415-32, Engineer Troop Unit Construction in Connection with Training Activities (15 Apr 1998).
4. AR 420-10, Management of Installation Directorates of Public Works (15 Apr 1997).
5. AR 420-18, Facilities Engineering Material, Equipment, and Relocatable Building Management (3 Jan 1992) [hereinafter AR 420-18].
6. DA Pam 415-15, Army Military Construction Program Development and Execution (25 Oct 1999) [hereinafter DA Pam 415-15].
7. DA Pam 420-11, Project Definition and Work Classification (7 Oct 1994) [hereinafter DA Pam 420-11].

C. Air Force Policy Directives (AFPD) and Air Force Instructions (AFI).

1. AFPD 32-90, Real Property Management (10 Sept 1993).
2. AFI 32-1021, Planning and Programming Military Construction (MILCON) Projects (24 Jan 2003).
3. AFI 32-1032, Planning and Programming Appropriated Funded Maintenance, Repair, and Construction Projects (25 Sept 2001).
4. AFI 32-6001, Family Housing Management (26 Apr 1994).
5. AFI 32-6002, Family Housing Planning, Programming, Design, and Construction (27 May 1997).
6. AFI 65-601, vol. 1, Budget Guidance and Procedures (21 Oct 1994).

- D. Navy Regulation. OPNAVINST 11010.20F, Facilities Projects Manual (7 Jun 1996).
- E. Richard J. Bednar, John Cibinic, Jr., Ralph C. Nash, Jr., et al., Construction Contracting, published by The George Washington University Government Contracts Program, 1991.
- F. Adrian L. Bastianelli, Andrew D. Ness, Federal Government Construction Contracts, published by the American Bar Association Forum on the Construction Industry, 2003.

III. CONCEPTS.

A. Definitions.

1. Construction.

- a. Statutory Definition. 10 U.S.C. § 2801(a). The term “military construction” includes “any construction, development, conversion, or extension of any kind carried out with respect to a military installation.”¹
- b. Regulatory Definitions.
 - (1) FAR 2.101. The term “construction” refers to the construction, alteration, or repair of buildings, structures, or other real property.
 - (a) Construction includes dredging, excavating, and painting.
 - (b) Construction does not include work performed on vessels, aircraft, or other items of personal property.

¹ The term “military installation” means “a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense.” 10 U.S.C. § 2801(c)(2).

(2) Service Regulations. See, e.g., AR 415-15, Glossary, sec. II; AR 415-32, Glossary, sec. II; AR 420-10, Glossary, sec. II; AFI 32-1021, paras. 3.2. and 4.2; AFI 32-1032, para. 5.1.1; AFI 65-601, vol. 1, attch 1; OPNAVINST 11010.20F, ch. 6, para. 6.1.1. The term “construction” includes:

- (a) The erection, installation, or assembly of a new facility;²
- (b) The addition, expansion, extension, alteration, conversion, or replacement of an existing facility;
- (c) The relocation of a facility from one site to another;
- (d) Installed equipment (e.g., built-in furniture, cabinets, shelving, venetian blinds, screens, elevators, telephones, fire alarms, heating and air conditioning equipment, waste disposals, dishwashers, and theater seats); and
- (e) Related site preparation, excavation, filling, landscaping, and other land improvements.

2. Military Construction Project. 10 U.S.C. § 2801(b). The term “military construction project” includes “all military construction work . . . necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility”

² The term “facility” means “a building, structure, or other improvement to real property.” 10 U.S.C. § 2801(c)(1).

B. Fiscal Distinctions.

1. As a general rule, the government funds projects costing less than \$750,000 with Operations and Maintenance (O&M) funds; projects costing more than \$750,000, but less than \$1.5 million, with Unspecified Minor Military Construction (UMMC) funds; and projects costing more than \$1.5 million with Military Construction (MILCON) funds. 10 U.S.C. §§ 2802, 2805. See Chapter 5, Construction Funding, in CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, FISCAL LAW COURSE DESKBOOK (current Edition), available on the TJAGSA Web Page in the Publications library (www.jagcnet.army.mil/TJAGSA).
2. For fiscal law purposes, "construction" does not include repair or maintenance. Therefore, the government may fund repair and maintenance projects with O&M funds, regardless of the cost. AR 420-10, Glossary, sec. II; AFI 32-1032, para. 1.3.2; OPNAVINST 11010.20F, paras. 3.1.1 and 4.1.1.
3. The government must award construction contracts in accordance with FAR Part 36, DFARS Part 236, and any applicable service supplement, regardless of the funding source.

C. Contracting Procedures.

1. As with most procurements, the government must take certain steps to procure construction properly.
2. These steps normally include:
 - a. Deciding which acquisition method to use;
 - b. Deciding which type of contract to use;
 - c. Deciding what, if any, pre-bid communications are required (or otherwise warranted);

- d. Deciding what information and which clauses to place in the solicitation;
 - e. Deciding which contractor should receive the award; and
 - f. Administering the contract.
- 3. An Independent Government Estimate, or IGE, is necessary if the proposed contract, or any proposed modification to a construction contract, exceeds \$100,000. The Contracting Officer may require an IGE for contracts less than \$100,000. The IGE is not normally disclosed to offerors. FAR 36.203. IGEs will be marked “For Official Use Only,” or “FOUO.” DFARS 236.203.

IV. METHODS OF ACQUIRING CONSTRUCTION.

- A. Sealed Bidding. FAR 6.401; FAR 36.103. Contracting officers must use sealed bidding procedures to acquire construction if:
 - 1. Time permits;
 - 2. Award will be made on the basis of price and price-related factors;
 - 3. Discussions are not necessary; and
 - 4. There is a reasonable expectation of receiving more than one bid.
- B. Negotiated Procedures. FAR 6.401; FAR 36.103.
 - 1. Contracting officers must use negotiated procedures to acquire construction if:
 - a. Time does not permit the use of seal bidding procedures;

- b. Award will not be made on the basis of price and price-related factors;
 - c. Discussions are necessary, or
 - d. There is not a reasonable expectation of receiving more than one bid. See Michael C. Avino, Inc., B-250689, Feb. 17, 1993, 93-1 CPD ¶ 148; see also Pardee Constr. Co., B-256414, June 13, 1994, 94-1 CPD ¶ 372.
 - 2. Contracting officers may use negotiated procedures to acquire construction outside the United States, its possessions, or Puerto Rico, even if sealed bidding is otherwise required.
 - 3. Contracting officers must use negotiated procedures to acquire architect-engineer services.
- C. Job Order Contracting. AFARS Subpart 5117.90. See Schnorr-Stafford Constr., Inc., B-227323, Aug. 12, 1987, 87-2 CPD ¶ 153; Salmon & Assoc., B-227079, Aug. 12, 1987, 87-2 CPD ¶ 152.
- 1. A job order contract (JOC) is an indefinite-delivery, indefinite-quantity contract used to acquire real property maintenance/repair and minor construction at the installation level.
 - 2. The government develops task specifications and a unit price book. The contractor then multiplies the government's unit price by its own coefficient (e.g., profit + overhead) to arrive at its bid/proposal price.
 - 3. After contract award, the parties enter into bilateral task orders for individual projects based on the tasks and prices specified in the JOC.³

³ Each task order becomes a fixed-price, lump sum contract. AFARS 5117.9003-1(e).

4. JOC Limitations.

- a. The government should not use a JOC for projects with an estimated value less than \$2,000, or greater than \$750,000. AFARS 5117.9000(a).
- b. The government cannot use a JOC to acquire installation facilities engineering support services (e.g., custodial or ground maintenance services). AFARS 5117.9002(b).
- c. The government cannot use a JOC to acquire architect-engineer services. AFARS 5117.9002(b).
- d. An IGE is required for orders of \$100,000 or more. AFARS 5117.9004-3(c).
- e. The government should not use a JOC to acquire work:
 - (1) Normally set aside for small and disadvantaged businesses;
 - (2) Traditionally covered by requirements contracts (e.g., painting, roofing, etc.);
 - (3) Covered by contracts awarded under the Commercial Activities Program; or
 - (4) The government can effectively and economically accomplish in-house.

AFARS 5117.9003-3(a).

D. Simplified Acquisition of Base Engineer Requirements (SABER) Program, AFFARS Appendix DD

1. Similar in scope and nature to the Army's JOC program, SABER is an ID/IQ contract vehicle to expedite the execution of non-complex minor construction and maintenance & repair projects. AFFARS DD-102 and 103(a).
2. The process of using the SABER is similar to the JOC. An established Unit Price Book and coefficients are combined to price each specific project. AFFARS DD-102.
3. SABER Limitations.
 - a. SABER should not be used to replace a traditional construction program, or for large, complex construction projects. SABER should also not be used for projects that are traditionally single skill/materials projects that are more appropriate for competitively bid contracts or single trade ID/IQs. AFFARS DD-104(a).
 - b. Saber shall not be used to acquire architect-engineering (A-E) services. AFFARS DD-104(b).
 - c. Individual SABER delivery orders shall not exceed \$500,000 unless waived by the installation commander. AFFARS DD-104(c).
 - d. SABER may not be used to perform non-personal services subject to the Service Contract Act. AFFARS DD-104(e).

E. Design-Build Contracting. 10 U.S.C. § 305a; 41 U.S.C. § 253m; FAR Subpart 36.3.

1. Background. In the past, a contracting officer could not award a contract to build a project to the firm that designed the project unless the agency head or the agency head's delegee approved. FAR 36.209. See Lawlor Corp., B-241945.2, Mar. 28, 1991, 70 Comp. Gen. 375, 91-1 CPD ¶ 335. In 1995, however, Congress established new, two-phase design-build selection procedures that allow the same firm to design and build a project. National Defense Authorization Act of 1996, Pub. L. No. 104-106, 110 Stat. 186 (1995).
2. Definitions. FAR 36.102.
 - a. "Design" is the process of defining the construction requirement, producing the technical specifications and drawings, and preparing the construction cost estimate.
 - b. "Design-bid-build" is the traditional method of construction contracting in which design and construction are sequential and contracted for separately, with two contracts and two contractors.
 - c. "Design-build" is the new method of construction contracting in which design and construction are combined in a single contract with a single contractor.
 - d. "Two-phase design-build" is a "design-build" method of construction contracting in which the government selects a limited number of offerors in Phase One to submit detailed proposals in Phase Two.
3. Policy. FAR 36.104. See FAR 36.301(b).
 - a. A contracting officer may use either design-bid-build or design-build procedures to acquire construction.

- b. Unless a contracting officer decides to use design-bid-build (or another authorized acquisition procedure), the contracting officer must use two-phase design-build procedures to acquire construction if:
 - (1) The contracting officer anticipates receiving three or more offers;
 - (2) Offerors must perform a substantial amount of design work (and incur substantial expenses) before they can develop their price proposals; and
 - (3) The contracting officer has considered the factors set forth in FAR 36.301(b)(2), including:
 - (a) The extent to which the agency has adequately defined its project requirements;
 - (b) The time constraints for delivery;
 - (c) The capability and experience of potential offerors;
 - (d) The suitability of the project for two-phase design-build procedures;
 - (e) The capability of the agency to manage the two-phase selection process;
 - (f) Other criteria established by the head of the contracting activity (HCA).

4. Procedures. FAR 36.303.

- a. The agency may issue one solicitation covering both phases, or two solicitations in sequence.

- b. Phase One. FAR 36.303-1.
 - (1) The agency evaluates Phase One proposals to determine which offerors the agency will ask to submit Phase Two proposals.
 - (2) The Phase One solicitation must include:
 - (a) The scope of work;
 - (b) The Phase One evaluation factors (e.g., technical approach, technical qualifications, etc.);
 - (c) The Phase Two evaluation factors; and
 - (d) A statement regarding the maximum number of offerors the government intends to include in the competitive range.⁴
- c. Phase Two. FAR 36.303-2. The contracting officer awards one contract using competitive negotiation procedures.

F. Construction as “Acquisition of Commercial Items,” FAR Part 12.

- 1. On 3 July 2003, the Administrator of the Office of Federal Procurement Policy (OFPP) issued a memorandum stating that FAR Part 12, Acquisition of Commercial Items, "should rarely, if ever be used for new construction acquisitions or non-routine alteration and repair services." Rather, “in accordance with long-standing practice, agencies should apply the policies of FAR Part 36 to these acquisitions.” See Memorandum, Administrator of Office of Federal Procurement Policy, to Agency Senior Procurement Executives, Subject: Applicability of FAR Part 12 to Construction Acquisitions (July 3, 2003).

⁴ This number should not exceed 5 unless the contracting officer determines that including more than five offerors in the competitive range is in the government’s best interests. FAR 36.303-1(a)(4).

2. The memorandum stated that Part 12 acquisitions are generally well suited for certain types of construction activities “that lack the level of variability found in new construction and complex alteration and repair,” such as routine painting or carpeting, simple hanging of drywall, everyday electrical or plumbing work, and similar noncomplex services.”

V. CONTRACT TYPES.

A. Firm Fixed-Price (FFP) Contracts. FAR 36.207.

1. Agencies normally award FFP contracts for construction.
2. The contracting officer may require pricing on a lump-sum, unit price, or combination basis.
 - a. With lump sum pricing, the agency pays a lump sum for:
 - (1) The total project; or
 - (2) Defined portions of the project.
 - b. With unit pricing, the agency pays a unit price for a specified quantity of work units.
 - c. Agencies must use lump-sum pricing unless:
 - (1) The contract involves large quantities of work such as grading, paving, building outside utilities, or site preparation;
 - (2) The agency cannot estimate the quantities of work adequately;
 - (3) The estimated quantities of work may change significantly during construction; or

- (4) Offerors would have to expend spend a lot of time/money to develop adequate estimates.

B. Fixed-Price Contracts with Economic Price Adjustment Clauses (FP w/EPA). FAR 36.207(c). Agencies may use this type of contract if:

1. The use of an EPA clause is customary for the type of work the agency is acquiring;
2. A significant number of offerors would not bid unless the agency included an EPA clause in the contract; or
3. Offerors would include unwarranted contingencies in their prices unless the agency included an EPA clause in the contract.

C. Cost-Reimbursement Contracts. See Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, § 101, 115 Stat. 474 (2001); DFARS 236.271; AFARS 5136.271; AFFARS 5336.271; NAPS 5236.271. The Assistant Secretary of Defense (Production and Logistics) (ASD(P&D)) must approve the award of a cost-plus-fixed-fee contract for construction if:

1. The activity uses military construction appropriations;
2. Performance will occur in the United States (Alaska excluded); and
3. The acquiring activity expects the contract to exceed \$25,000.

D. Incentive and Other “Fee” Contracts. FAR 36.208. Activities cannot use incentive, cost-plus-fixed-fee, or other fee contracts at the same work site with firm fixed-price contracts without the approval of the HCA.

VI. PRE-BID COMMUNICATIONS.

A. Presolicitation Notices. FAR 36.213-2; FAR 36.701(a); FAR 53.301-1417, Standard Form (SF) 1417, Presolicitation Notice (Construction Contract).

1. The contracting officer must send presolicitation notices to prospective bidders if the proposed contract is expected to equal or exceed \$100,000.
2. Contents. FAR 36.213-2(b). Among other things, presolicitation notices must:
 - a. Describe the magnitude of the project;⁵
 - b. State the location of the proposed work;
 - c. Include relevant dates (e.g., the proposed bid opening date and the proposed contract completion date);
 - d. State where contractors can inspect the contract plans without charge;⁶
 - e. Specify a date by which bidders should submit requests for the solicitation;
 - f. State whether the government intends to restrict award to small businesses; and

⁵ The contracting officer cannot disclose the government cost estimate; however, the contracting officer can state the magnitude of the project in terms of physical characteristics and estimated price range. FAR 36.204; DFARS 236.204. The Estimated price ranges are as follows:

- (a) Less than \$25,000.
- (b) Between \$25,000 and \$100,000.
- (c) Between \$100,000 and \$250,000.
- (d) Between \$250,000 and \$500,000.
- (e) Between \$500,000 and \$1,000,000.
- (f) Between \$1,000,000 and \$5,000,000.
- (g) Between \$5,000,000 and \$10,000,000.
- (h) More than \$10,000,000.

FAR 36.204 -- Disclosure of the Magnitude of Construction Projects. The DFARS provides ranges between \$10,000,000 and 500,000,000. (the additional ranges are: \$10M - \$25M, \$25M - \$100 M, \$100M - \$250M, and \$250M - \$500M.) DFARS 236.204.

⁶ Beginning on 17 August 2000, the Contracting Officer may provide contract drawings and specifications solely in electronic format. DFARS 252.236-70001.

- g. Specify the amount the government intends to charge for solicitation documents, if any.
 - 3. Distribution. FAR 36.211.
 - a. The contracting officer should send presolicitation notices to:
 - (1) Contractors on the bidders list; and
 - (2) Organizations that maintain display rooms for such information.
 - b. The contracting officer determines the geographical range of distribution.
- B. Government-wide Point of Entry (GPE). FAR 36.213, FAR 5.003. The contracting officer must also post the presolicitation notice in the GPE.

VII. SOLICITATION.

- A. Forms. FAR 36.701; FAR 53.301-1442, SF 1442, Solicitation, Offer, and Award (Construction, Alteration, or Repair); DFARS 236.701.
 - 1. The contracting officer uses a SF 1442 in lieu of a SF 33.
 - 2. If a bidder fails to return this form with its offer, the offer is nonresponsive. See C.J.M. Contractors, Inc., B-250493.2, Nov. 24, 1992, 92-2 CPD ¶ 376.
- B. The contracting officer may provide drawings, specifications, and Maps in either hard-copy or completely in electronic format. DFARS 236.570 and 252.236-7001.
- C. Statutory Limitations. FAR 36.205; DFARS 252.236-7006.

1. The solicitation must include any statutory cost limitations. See K.C. Brandon Constr., B-245934, Feb. 3, 1992, 92-1 CPD ¶ 139.⁷
2. The government must normally reject any offer that:
 - a. Exceeds the applicable statutory limitations;⁸ or
 - b. Is only within the statutory limitations because it is materially unbalanced.

See William G. Tadlock Constr., B-252580, June 29, 1993, 93-1 CPD ¶ 502; H. Angelo & Co., B-249412, Nov. 13, 1992, 92-2 CPD ¶ 344.

3. Some statutory limitations are waivable. See 10 U.S.C. § 2853; see also TECOM, Inc., B-240421, Nov. 9, 1990, 90-2 CPD ¶ 386.

D. Site Familiarization Clauses.

⁷ FAR 36.205 -- Statutory Cost Limitations.

- (a) Contracts for construction shall not be awarded at a cost to the Government --
 - (1) In excess of statutory cost limitations, unless applicable limitations can be and are waived in writing for the particular contract; or
 - (2) Which, with allowances for Government-imposed contingencies and overhead, exceeds the statutory authorization.
- (b) Solicitations containing one or more items subject to statutory cost limitations shall state --
 - (1) The applicable cost limitation for each affected item in a separate schedule;
 - (2) That an offer which does not contain separately-priced schedules will not be considered; and
 - (3) That the price on each schedule shall include an approximate apportionment of all estimated direct costs, allocable indirect costs, and profit.
- (c) The Government shall reject an offer if its prices exceed applicable statutory limitations, unless laws or agency procedures provide pertinent exemptions. However, if it is in the Government's interest, the contracting officer may include a provision in the solicitation which permits the award of separate contracts for individual items whose prices are within or subject to applicable statutory limitations.
- (d) The Government shall also reject an offer if its prices are within statutory limitations only because it is materially unbalanced. An offer is unbalanced if its prices are significantly less than cost for some work, and overstated for other work.

⁸ The contracting officer may award separate contracts for individual items whose prices are within the applicable statutory limitations if: (1) the contracting officer included a provision that permits such awards in the solicitation; and (2) such awards are in the government's interest. FAR 36.205(c); FAR 52.214-19.

1. Site Investigation and Conditions Affecting the Work. FAR 36.210; FAR 36.503; FAR 52.236-3.
 - a. By submitting a bid, a contractor acknowledges that it has investigated the job site and the conditions affecting the proposed work.
 - b. Among other things, a contractor is supposed to investigate:
 - (1) Conditions bearing upon transportation, disposal, handling, and storage of materials;
 - (2) The availability of labor, water, electric power, and roads;
 - (3) Uncertainties of weather, river stages, tides, and similar physical conditions at the site;
 - (4) The conformation and condition of the ground;
 - (5) The character of needed equipment and facilities;
 - (6) The character, quality, and quantity of discoverable surface and subsurface materials and/or obstacles;
 - c. A contractor need not hire its own geologists or conduct extensive engineering efforts to verify conditions that it can reasonably infer from the solicitation or a site visit. See Michael-Mark Ltd., IBCA No. 2697, 94-1 BCA ¶ 26,453.

- d. A contractor must perform at the contract price if the contractor could have discovered a condition by a reasonable site investigation. See Weeks Dredging & Contracting, Inc. v. United States, 13 Cl. Ct. 193 (1987); Avisco, Inc., ENG BCA No. 5802, 93-3 BCA ¶ 26,172; Signal Contracting, Inc., ASBCA No. 44963, 93-2 BCA ¶ 25,877; cf. I.M.I., Inc., B-233863, Jan. 11, 1989, 89-1 CPD ¶ 30.
 - e. The government is not normally bound by the contractor's interpretation of government data and representations not included in the solicitation. See Eagle Contracting, Inc., AGBCA No. 88-225-1, 92-3 BCA ¶ 25,018.
 - 2. Physical Data. FAR 36.504; FAR 52.236-4.
 - a. The contracting officer may provide physical data for the convenience of the contractor.
 - b. The government is not responsible for a contractor's erroneous interpretations or conclusions. But see United Contractors v. United States, 177 Ct. Cl. 151, 368 F.2d 585 (Ct. Cl. 1966).
 - 3. Changes After Bid Closing Date. The government is normally responsible for increased performance costs caused by changes at a site after the date of bid submission, even if offerors agree to extend the bid acceptance period. See Valley Constr. Co., ENG BCA No. 6007, 93-3 BCA ¶ 26,171.
- E. Bid Guarantees. FAR 28.101; FAR 52.228-1; FAR 53.301-24, SF 24, Bid Bond.
- 1. A bid guarantee ensures that a bidder will:
 - a. Not withdraw its bid during the bid acceptance period; and
 - b. Execute a written contract and furnish other required bonds at the time of contract award.
 - 2. Requirement. FAR 28.101-1.

- a. The contracting officer must normally require a bid guarantee whenever the solicitation requires performance and payment bonds. Performance and payment bonds are required by the Miller Act, 40 U.S.C. 270a-270f) for construction contracts exceeding \$100,000, except as authorized by law. FAR 28.102-1. (See Section IX.B, below.)
- b. Contracting Officers may still require bid guarantees in construction contracts less than \$100,000. See, Lawson's Enterprises, Inc. Comp. Gen., B-286708, Jan. 31, 2001, 2001 CPD ¶ 36.
- c. The chief of the contracting office, however, may waive the requirement to provide a bid guarantee if the chief of the contracting office determines that it not in the government's best interest to require a bid guarantee (e.g., for overseas construction, emergency acquisitions, and sole-source contracts).

3. Form.

- a. The bid guarantee must be in the form required by the solicitation. See HR Gen. Maint. Corp. B-260404, May 16, 1995, 95-1 CPD ¶ 247; Concord Analysis, Inc., B-239730, Dec. 4, 1990, 90-2 CPD ¶ 452. But see Mid-South Metals, Inc., B-257056, Aug. 23, 1994, 94-2 CPD ¶ 78.
- b. The FAR permits offerors to use surety bonds, postal money orders, certified checks, cashier's checks, irrevocable letters of credit, U.S. bonds, and/or cash. FAR 52.228-1. See Treasury Dep't Cir. 570 (listing acceptable commercial sureties).
- c. If a bidder uses an individual surety, the surety must provide a security interest in acceptable assets equal to the penal sum of the bond. FAR 28.203. See Paradise Const. Co., Comp. Gen. Dec. B-289144, 2001 CPD ¶ 192.

- (1) The adequacy of an individual surety's offering is a matter of responsibility, not responsiveness. See Gene Quigley, Jr., B-241565, Feb. 19, 1991, 70 Comp. Gen. 273, 91-1 CPD ¶ 182. But see Harrison Realty Corp., B-254461.2, 93-2 CPD ¶ 345.
 - (2) A bidder may not be its own individual surety. See Astor V. Bolden, B-257038, Apr. 26, 1994, 94-1 CPD ¶ 288.
4. Penal Amount. FAR 28.101-2 (b). The bid bond must equal 20% of the bid, but not exceed \$3,000,000. But see FAR 28.101-4(c).
5. The contracting officer may not accept a bid accompanied by an apparently unenforceable guarantee. Conservatek Indus., Inc., B-254927, Jan. 26, 1994, 94-1 CPD ¶ 42; MKB Constructors, Inc., B-255098, Jan. 10, 1994, 94-1 CPD ¶ 10; Arlington Constr., Inc., B-252535, July 9, 1993, 93-2 CPD ¶ 10; Cherokee Enter., Inc., B-252948, June 3, 1993, 93-1 CPD ¶ 429; Hugo Key & Son, Inc., B-245227, Aug. 22, 1991, 91-2 CPD ¶ 189; Techno Eng'g & Constr., B-243932, July 23, 1991, 91-2 CPD ¶ 87; Maytal Constr. Corp., B-241501, Dec. 10, 1990, 90-2 CPD ¶ 476; Bird Constr., B-240002, Sept. 19, 1990, 90-2 CPD ¶ 234.
6. Noncompliance with Bid Guarantee Requirements. FAR 28.101-4.
 - a. Noncompliance with bid guarantee requirements normally renders a bid nonresponsive. See Alarm Control Co., B-246010, Nov. 18, 1991, 91-2 CPD ¶ 472.
 - b. The contracting officer, however, may waive the requirement to submit a bid guarantee under nine circumstances. FAR 28.101-4(c). See Rufus Murray Commercial Roofing Sys., B-258761, Feb. 14, 1995, 95-1 CPD ¶ 83; Apex Servs., Inc., B-255118, Feb. 9, 1994, 94-1 CPD ¶ 95.
- F. Pre-Bid Conferences. FAR 14.207. Contracting officers may hold pre-bid conferences when necessary to brief bidders and explain complex specifications and requirements; however, client control is critical. See Cessna Aircraft Co., ASBCA No. 48118, 95-1 BCA ¶ 27,560.

- G. Bid/Proposal Preparation Time. FAR 36.213-3. The contracting officer must give bidders ample time to conduct site visits, obtain subcontractor bids, examine data, and prepare estimates. See Raymond Int'l of Del., Inc., ASBCA No. 13121, 70-1 BCA ¶ 8,341.

VIII. AWARD.

A. Responsiveness Issues.

1. A bid is nonresponsive if it exceeds a statutory dollar limitation. FAR 36.205(c); DFARS 252.236-7006. See Ward Constr. Co., B-240064, July 30, 1990, 90-2 CPD ¶ 87; Wynn Constr. Co., B-220649, Feb. 21, 1986, 86-1 CPD ¶ 184.
2. A bid is nonresponsive if the bidder fails to comply with the bid guarantee requirements. FAR 28.101-4(a). See Maytal Constr. Corp., B-241501, Dec. 10, 1990, 90-2 CPD ¶ 476. But see FAR 28.101-4(c) (listing the nine circumstances under which the contracting officer may waive the requirement to submit a bid guarantee).
3. A bid is nonresponsive if the bidder offers a shorter bid acceptance period than the solicitation requires. See SF 1442, Block 13D.
4. A bid is nonresponsive if the bidder fails to acknowledge a material amendment. See Dutra Constr. Co., B-241202, Jan. 31, 1991, 91-1 CPD ¶ 97.
5. A bid is nonresponsive if the bidder fails to acknowledge a Davis-Bacon wage rate amendment unless the offeror is bound by a wage rate equal to or greater than the new rate. See Tri-Tech Int'l, Inc., B-246701, Mar. 23, 1992, 92-1 CPD ¶ 304; Fast Elec. Contractors, Inc., B-223823, Dec. 2, 1986, 86-2 CPD ¶ 627.
6. A bid is nonresponsive if the bidder equivocates on the requirement to obtain permits and licenses. See Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555.

7. A bid is nonresponsive if it is materially unbalanced. FAR 36.205(d); FAR 52.214-19.
 - a. The government may reject a bid if the bid prices are materially unbalanced between line items, or between subline items.
 - b. A bid is materially unbalanced when:
 - (1) The bid is based on prices that are significantly less than cost for some work, and significantly greater than cost for other work and there is reasonable doubt that the bid will result in the lowest overall cost to the government; or
 - (2) The bid is so unbalanced that it is tantamount to allowing the contractor to recover money in advance of performing the work.

B. Responsibility Issues.

1. Prequalification of Sources. DFARS 236.272. The contracting officer may establish a list of contractors that are qualified to perform a specific contract and limit competition to those contractors.
 - a. The HCA must: (1) determine that the project is so urgent or complex that prequalification is necessary; and (2) approve the prequalification procedures.
 - b. If the contracting officer finds a small business unqualified for responsibility reasons, the contracting officer must refer the matter to the Small Business Administration (SBA) for a preliminary recommendation.
 - c. If the SBA determines that the small business is responsible, the contracting officer must allow it to submit a proposal.

2. Performance Evaluation Reports. FAR 36.201; FAR 53.301-1420, SF 1420, Performance Evaluation, Construction Contracts; DFARS 236.201; AFARS 5136.201; DD Form 2628, Performance Evaluation (Construction).
 - a. Contracting activities must prepare performance evaluation reports for:
 - (1) Construction contracts valued at \$500,000 or more;⁹ and
 - (2) Default terminated construction contracts valued at \$10,000 or more.
 - b. Upon their completion, contracting activities must send performance evaluation reports to: U.S. Army Corps Of Engineers, Portland District, ATTN: CENWP-CT-I, P.O. Box 2946, Portland, OR 97208-2946. Available on-line at: <http://www.nwp.usace.army.mil/ct/i/>. You may also reach this data through: www.usace.army.mil.
 - c. Contracting officers may use performance evaluation reports as part of their preaward survey.¹⁰
3. Small Businesses. FAR 19.602-1. Before a contracting officer can reject a small business as nonresponsible, the contracting officer must refer the matter to the SBA for a Certificate of Competency (COC).

⁹ In the Army, contracting activities must prepare performance evaluation reports for each order placed under a JOC of \$100,000 or more. AFARS 36.201.

¹⁰ Within DOD, the contracting officer must use performance evaluation reports if the agency expects the proposed contract to exceed \$1 million. DFARS 236.201.

4. Performance of Work by Contractor. FAR 36.501; FAR 52.236-1.
 - a. Whether a contractor intends to perform the contractually required percentage of work with its own forces is normally a matter of responsibility, not responsiveness. See Luther Constr. Co., B-241719, Jan. 28, 1991, 91-1 CPD ¶ 76. But see Blount, Inc. v. United States, 22 Cl. Ct. 221 (1990); C. Iber & Sons, Inc., B-247920.2, Aug. 12, 1992, 92-2 CPD ¶ 99.
 - b. FAR clause 52.236-1 (Performance of Work by the Contractor) does not apply to small business or 8(a) set-asides. FAR 36.501(b). But see FAR clause 52.219-14.

C. Price Evaluation.

1. The contracting officer must evaluate additive items properly. DFARS 236.303-70; DFARS 252.236-7007.
2. The contracting officer must award the contract to the bidder who submits the low bid for the base project and the additive items which, in order of priority, provide the most features within the applicable funding constraints.
3. The contracting officer must select the low bidder based on the funding available at the time of bid opening. See Huntington Constr., Inc., B-230604, June 30, 1988, 67 Comp. Gen. 499, 88-1 CPD ¶ 619; Applicators Inc., B-270162, Feb. 1, 1996, 96-1 CPD ¶ 32.

IX. CONTRACT ADMINISTRATION.

- A. Preconstruction Orientation. FAR 36.212. See FAR 52.236-26; see also FAR 22.406-1; DFARS 222.406-1.
 1. The contracting officer must inform successful offerors of significant matters of interest (e.g., statutory matters, subcontracting plan requirements, contract administration matters, etc.).

2. The contracting officer may issue an explanatory preconstruction letter or hold a preconstruction conference.

B. Performance and Payment Bonds.

1. Requirements. 40 U.S.C. §§ 270a-270f; FAR 28.102-1.

- a. Contracts Over \$100,000. FAR 28.102-1(a); FAR 28.102-3(a); FAR 52.228-15. The contractor must provide performance and payment bonds before it can begin work. See TLC Servs., Inc., B-254972.2, Mar. 30, 1994, 94-1 CPD ¶ 235.

- b. Contracts Between \$25,000 and \$100,000. FAR 28.102-1(b); FAR 28.102-3(b); FAR 52.228-13.

- (1) The contracting officer must select two or more of the following payment protections:

- (a) Payment bonds;

- (b) Irrevocable letters of credit;¹¹

- (c) Tripartite escrow agreements; or

- (d) Certificates of deposit.

- (2) The contractor must submit one of the selected payment protections before it can begin work.

¹¹ The contracting officer is suppose to give “particular consideration” to including irrevocable letters of credit as one of the selected payment protections. FAR 28.102-1(b).

2. Performance Bonds. FAR 28.102-2(a); FAR 52.228-15; FAR 53.301-25, SF 25, Performance Bond.
 - a. Performance bonds protect the government.
 - b. The penal amount of the bond is normally 100% of the original contract price.
 - (1) The contracting officer may reduce the penal amount if the contracting officer determines that a lesser amount adequately protects the government.
 - (2) The contracting officer may require additional protection if the contract price increases.
3. Payment Bonds. FAR 28.102-2(b); FAR 52.228-15; FAR 53.301-25-A, SF 25-A, Payment Bond.
 - a. Payment bonds protect subcontractors and suppliers.
 - b. The penal amount must equal 100% of the original contract price unless the contracting officer determines, in writing, that requiring a payment bond in that amount is impractical.
 - (1) If the contracting officer determines that requiring a payment bond in an amount equal to 100% of the original contract price is impractical, the contracting officer must set the penal amount of the bond.
 - (2) The amount of the payment bond may never be less than the amount of the performance bond.

See Construction Industry Payment Protection Act of 1999, Pub. L. No. 106-49, 113 Stat. 231.

4. Noncompliance with Bond Requirements. Failure to provide acceptable bonds justifies terminating the contract for default. FAR 52.228-1. See Pacific Sunset Builders, Inc., ASBCA No. 39312, 93-3 BCA ¶ 25,923.
5. Withholding Contract Payments. FAR 28.106-7.
 - a. During Contract Performance. The contracting officer should not withhold payments. FAR 28.106-7(a). But see Balboa Ins. Co. v. United States, 775 F.2d 1158 (Fed. Cir. 1985); National Surety Corp., 31 Fed. Cl. 565 (1994); Johnson v. All-State Const., 329 F.3d 848 (CAFC 2003) (Government was entitled to withhold progress payments pursuant to its common-law right to set-off pending liquidated damages).
 - b. After Contract Completion. The contracting officer must withhold final payment if the surety provides written notice regarding the contractor's failure to pay its subcontractors or suppliers.
 - (1) The surety must agree to hold the government harmless.
 - (2) The contracting officer may release final payment if:
 - (a) The parties reach an agreement; or
 - (b) A court determines the parties' rights.
 - c. Labor Violations. See generally FAR Part 22.
6. Waiver Provisions. 10 U.S.C. §§ 270a(b) and 270e; FAR 28.102-1(a).
 - a. The contracting officer may waive the requirement to provide performance and payment bonds if:
 - (1) The contractor performs the work in a foreign country and the contracting officer determines that it is impracticable to require the contractor to provide the bonds; or

(2) The Miller Act (or another statute) authorizes the waiver.

b. The Service Secretaries may waive the requirement to provide performance and payment bonds for cost-type contracts.

C. Differing Site Conditions (DSC). FAR 52.236-2.

1. This clause allows for an equitable adjustment if the contractor provides prompt, written notice of a differing site condition.

2. There are two types of differing site conditions. See Consolidated Constr., Inc., GSBICA No. 8871, 88-2 BCA ¶ 20,811.

a. Type I Differing Site Conditions. To recover for a Type I condition, the contractor must prove that:

(1) The contract either implicitly or explicitly indicated a particular site condition. See Franklin Pavkov Constr. Co., HUD BCA No. 93-C-C13, 94-3 BCA ¶ 27,078; Glagola Constr. Co., Inc., ASBCA No. 45579, 93-3 BCA ¶ 26,179; Konoike Constr. Co., ASBCA No. 36342, 91-1 BCA ¶ 23,440; cf. Jack L. Olsen, Inc., AGBICA No. 87-345-1, 93-2 BCA ¶ 25,767.

(2) The contractor reasonably interpreted and relied on the contract indications. See R.D. Brown Contractors, Inc., ASBCA No. 43973, 93-1 BCA ¶ 25,368.

(3) The contractor encountered latent or subsurface conditions that differed materially from those indicated in the contract. See Meredith Constr. Co., ASBCA No. 40839, 93-1 BCA ¶ 25,399; Caesar Constr., Inc., ASBCA No. 41059, 91-1 BCA ¶ 23,639.

(4) The claimed costs were attributable solely to the differing site condition. See P.J. Dick, Inc., GSBICA No. 12036, 94-3 BCA ¶ 27,073.

- b. Type II Differing Site Conditions. To recover for a Type II condition, the contractor must prove that:
 - (1) The conditions encountered were unusual physical conditions that were unknown at the time of contract award. See Walser v. United States, 23 Cl. Ct. 591 (1991); Gulf Coast Trailing Co., ENG BCA No. 5795, 94-2 BCA ¶ 26,921; Soletanche Rodio Nicholson (JV), ENG BCA No. 5796, 94-1 BCA ¶ 26,472.
 - (2) The conditions differed materially from those ordinarily encountered. See Green Constr. Co., ASBCA No. 46157, 94-1 BCA ¶ 26,572; Virginia Beach Air Conditioning Corp., ASBCA No. 42538, 92-1 BCA ¶ 24,432; Arctic Slope, Alaska Gen./SKW Eskimos, Inc., ENG BCA No. 5023, 90-2 BCA ¶ 22,850.
3. The DSC clause only covers conditions existing at the time of contract award. Acts of nature occurring after contract award are not differing site conditions. See Arundel Corp. v. United States, 96 Ct. Cl. 77, 354 F.2d 252 (1942); Meredith Constr. Co., ASBCA No. 40839, 93-1 BCA ¶ 25,399; PK Contractors, Inc., ENG BCA No. 4901, 92-1 BCA ¶ 24,583. But see Valley Constr. Co., ENG BCA No. 6007, 93-3 BCA ¶ 26,171.
4. The contractor may not recover if the contractor could have discovered the condition during a reasonable site investigation. See O.K. Johnson Elec. Co., VABCA No. 3464, 94-1 BCA ¶ 26,505; cf. Urban General Contractors, Inc., ASBCA No. 49653, 96-2 BCA ¶ 28,516; Indelsea, S.A., ENG BCA No. PCC-117, 95-2 BCA ¶ 27,633; Steele Contractors, Inc., ENG BCA No. 6043, 95-2 BCA ¶ 27,653; Operational Serv. Corp., ASBCA No. 37059, 93-3 BCA ¶ 26,190; Sagebrush Consultants, 01-1 BCA ¶ 31,159 (IBCA), and American Constr., 01-1 BCA ¶ 31,202.
5. The contractor cannot create its own differing site condition. See Geo-Con, Inc., ENG BCA No. 5749, 94-1 BCA ¶ 26,359.
6. The contractor must prove its damages. See H.V. Allen Co., ASBCA No. 40645, 91-1 BCA ¶ 23,393; see also Praught Constr. Corp., ASBCA No. 39670, 93-2 BCA ¶ 25,896.

7. The contractor must promptly notify the government. See Engineering Tech. Consultants, S.A., ASBCA No. 43376, 92-3 BCA ¶ 25,100.
 - a. Untimely notification may bar a differing site condition claim if the late notice prejudices the government. See Moon Constr. Co. v. General Servs. Admin., GSBCA No. 11766, 93-3 BCA ¶ 26,017; see also Hemphill Contracting Co., ENG BCA No. 5698, 94-1 BCA ¶ 26,491; Meisel Rohrbau, ASBCA No. 35566, 92-1 BCA ¶ 24,434; Holloway Constr., Holloway Sand & Gravel Co., ENG BCA No. 4805, 89-2 BCA ¶ 21,713.
 - b. If the government's defense to a differing site condition claim is made more difficult—but not impossible—by the late notice, courts and boards will normally waive the notice requirement and place a heavier burden of persuasion on the contractor. See Glagola Constr. Co., ASBCA No. 45579, 93-3 BCA ¶ 26,179.
 - c. When the government is on notice of differing site conditions, but takes no exception to the contractor's notice or its corrective actions, the government must pay the contractor's increased costs. See Potomac Marine & Aviation, Inc., ASBCA No. 42417, 93-2 BCA ¶ 25,865.
 - d. Lack of notice of a differing site condition will not bar a contractor's recovery when the government breaches its duty to cooperate by failing to designate an inspector to whom the contractor may give notice during scheduled weekend work. See Hudson Contracting, Inc., ASBCA No. 41023, 94-1 BCA ¶ 26,466.
8. No DSC claim if the contract does not contain the DSC clause. See Marine Industries Northwest, Inc., ASBCA No. 51942, 01-1 BCA ¶ 31,201 (board rejected a Type II DSC claims solely on the basis that there was no DSC clause in the contract. Without the DSC clause, the contractor bears complete risk for any differing conditions encountered).
9. Final payment bars an unreserved differing site condition claim. FAR 52.236-2(d).

D. Variations in Estimated Quantity. FAR 52.211-18.

1. A fixed-price contract may include estimated quantities for unit-priced items of work.
2. If the actual quantity of a unit-priced item varies more than 15% above or below the estimated quantity, the contracting officer must equitably adjust the contract based on “any increase or decrease in costs due solely to the variation.” See Clement-Mtarri Cos., ASBCA No. 38170, 92-3 BCA ¶ 25,192, aff’d sub nom., Shannon v. Clement-Mtarri Cos., No. 93-1268, 12 FPD ¶ 114 (Fed. Cir. 1993); cf. Westland Mechanical, Inc., ASBCA No. 48844, 96-2 BCA ¶ 28,419.
3. Whether a party may demand repricing of work that falls outside the 15% range, or whether the original contract unit price controls, is now settled. Adjustments are based on the difference between the unit cost of the original work, and the unit cost of the work outside the allowable variation range. Foley Co. v. United States, 11 F.3d 1092 (Fed. Cir. 1993). But see TECOM, Inc., ASBCA No. 44122, 94-1 BCA ¶ 26,483.
4. The contractor may request a performance period extension if the variation in the estimated quantity causes an increase in the performance period.

E. Suspension of Work. FAR 52.242-14.

1. The contracting officer may suspend, interrupt, or delay work for the convenience of the government. See Valquest Contracting, Inc., ASBCA No. 32454, 91-1 BCA ¶ 23,381.
2. A government delay is compensable if:
 - a. It is unreasonable. See Southwest Constr. Corp., ENG BCA No. 5286, 94-3 BCA ¶ 27,120; C&C Plumbing & Heating, ASBCA No. 44270, 94-3 BCA ¶ 27,063; Kimmins Contracting Corp., ASBCA No. 46390, 94-2 BCA ¶ 26,869; F.G. Haggerty Plumbing Co., VABCA No. 4482, 95-2 BCA ¶ 27,671.

- b. The contracting officer orders it. See Mergentime Corp., ENG BCA No. 5765, 92-2 BCA ¶ 25,007; Durocher Dock & Dredge, Inc., ENG BCA No. 5768, 91-3 BCA ¶ 24,145. But see Fruehauf Corp. v. United States, 218 Ct. Cl. 456, 587 F.2d 486 (1978); Asphalt Roads & Materials Co., ASBCA No. 43625, 95-1 BCA ¶ 27,544; Henderson, Inc., DOT BCA No. 2423, 94-2 BCA ¶ 26,728; Lane Constr. Corp., ENG BCA No. 5834, 94-1 BCA ¶ 26,358.
 - c. The contractor has not caused the suspension by its (or its subcontractor's) negligence or failure to perform. See Hvac Constr. Co., Inc. v. United States, 28 Fed. Cl. 690 (1993).
 - d. The cost of performance increases. See Missile Sys., Inc., ASBCA No. 46079, 94-3 BCA ¶ 27,091; Frazier-Fleming Co., ASBCA No. 34537, 91-1 BCA ¶ 23,378.
- 3. The contractor may be entitled to delay costs (even if it finishes work on time) if it proves that it planned to finish the work early, but was delayed by the government. See Oneida Constr., Inc., ASBCA No. 44194, 94-3 BCA ¶ 27,237; Labco Constr., Inc., AGBCA No. 90-115-1, 94-2 BCA ¶ 26,910.
 - 4. The contractor may not recover delay costs where the government provides greater access to a work site for a portion of the performance period, without binding the government to increased access for the duration of the entire contract, and the government then restricts access to the original contract requirements. Atherton Construction, Inc., ASBCA No. 48527, 00-2 BCA ¶ 30,968. (In a family housing renovation contract, the government provided access to more than the contractually required 14 dwelling units for a period of 48 days. Unilateral action by the government, no recovery allowed.)
 - 5. A contractor may be entitled to a performance period extension even if the delay is reasonable. A contractor also may raise government delay as a defense to a default termination or an assessment of liquidated damages. See Farr Bros., Inc., ASBCA No. 42658, 92-2 BCA ¶ 24,991.

6. If both the contractor and the government contribute to a delay and the causes of the delay are so intertwined that the periods and costs of delay cannot be apportioned clearly, neither party can recover for the delay. See Wilner v. United States, 994 F.2d 783, 786 (Fed. Cir. 1993); cf. G. Bliudzius Contractors, ASBCA No. 42366, 93-3 BCA ¶ 26,074.
7. Profit is not recoverable and final payment bars unreserved suspension claims.
8. Constructive Suspensions.
 - a. A constructive suspension of work may arise if:
 - (1) The government fails to issue a notice to proceed within a reasonable time after contract award. See Marine Constr. & Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286.
 - (2) The government fails to provide timely guidance following a reasonable request for direction. See Tayag Bros. Enters., Inc., ASBCA No. 42097, 94-2 BCA ¶ 26,962.
 - b. A contractor may not recover delay costs for more than 20 days unless the contractor notifies the government of the delay. FAR 52.242-14. This rule, however, is subject to a prejudice test.

F. Permits and Responsibilities. FAR 52.236-7.

1. A contractor must obtain applicable permits and licenses (and comply with applicable laws and regulations) at no additional cost to the government. See GEM Eng'g Co., DOT BCA No. 2574, 94-3 BCA ¶ 27,202; C'n R Indus. of Jacksonville, Inc., ASBCA No. 42209, 91-2 BCA ¶ 23,970; Holk Dev., Inc., ASBCA No. 40137, 90-2 BCA ¶ 22,852. But see Hills Materials v. Rice, 982 F.2d 514 (Fed. Cir. 1992); Hemphill Contracting Co., ENG BCA No. 5698, 94-1 BCA ¶ 26,491.

2. Burden on contractor is continuing and applies to requirements arising after contract award. "It is well established that the Permits and Responsibilities clause requires contractors to comply with laws and regulations issued subsequent to award without additional compensation unless there is another clause in the contract that limits the clause to laws and regulations in effect at the time of award. [Shirley Construction Co., ASBCA No. 42954 92-1 BCA P24,563.](#)
3. Normally, licensing is a question of responsibility, not responsiveness. See [Restec Contractors, Inc.](#), B-245862, Feb. 6, 1992, 92-1 CPD ¶ 154; [Computer Support Sys., Inc.](#), B-239034, Aug. 2, 1990, 69 Comp. Gen. 645, 90-2 CPD ¶ 94. But see [Bishop Contractors, Inc.](#), B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555.
4. A contractor assumes the risk of loss or damage to its equipment.¹² In addition, a contractor is responsible for injuries to third persons. See [Potashnick Constr., Inc.](#), ENG BCA No. 5551, 92-2 BCA ¶ 24,985; [Aulson Roofing, Inc.](#), ASBCA No. 37677, 91-1 BCA ¶ 23,720.
5. A contractor is responsible for work in progress until the government accepts it. See [Labco Constr., Inc.](#), ASBCA No. 44945, 93-3 BCA ¶ 26,027; [Tyler Constr. Co.](#), ASBCA No. 39365, 91-1 BCA ¶ 23,646; [D.J. Barclay & Co.](#), ASBCA No. 28908, 88-2 BCA ¶ 20,741. But see [Fraser Eng'g Co.](#), VABCA No. 3265, 91-3 BCA ¶ 24,223; [Joseph Beck & Assocs.](#), ASBCA No. 31126, 88-1 BCA ¶ 20,428.

G. Specifications and Drawings. FAR 52.236-21; DFARS 252.236-7001.

1. The omission or misdescription of details of work that are necessary to carry out the intent of the contract drawings and specifications (or are customarily performed) does not relieve a contractor from its obligation to perform the omitted or misdescribed details of work. A contractor must perform as if the drawings and specifications describe the details fully and correctly. See [Wood & Co. v. Dep't of Treasury](#), GSBCA No. 12452-TD, 94-1 BCA ¶ 26,365; [Single Ply Sys., Inc.](#), ASBCA No. 42168, 91-2 BCA ¶ 24,032.

¹² The contractor may bear similar responsibilities under a Government Furnished Property clause. FAR 52.245-4. See [Technical Servs. K.H. Nehlsen GmbH](#), ASBCA No. 43869, 94-1 BCA ¶ 26,377.

2. The contractor must review all drawings before beginning work, and the contractor is responsible for any errors that a reasonable review would have detected. M.A. Mortenson Co., ASBCA 50,383, 00-2 BCA ¶ 30,936, (denying Mortenson's claim based on omissions in construction drawings), But see Wick Constr. Co., ASBCA No. 35378, 89-1 BCA ¶ 21,239.
3. If the specifications contain provisions that conflict with the contract drawings, the specifications govern. The parties may rely on this order of precedence regardless of whether an ambiguity is patent. See Hensel Phelps Constr. Co., 886 F.2d 1296 (Fed. Cir. 1989); Shemya Constructors, ASBCA No. 45251, 94-1 BCA ¶ 26,346; Rohr, Inc., ASBCA No. 44193, 93-2 BCA ¶ 25,871. But see J.S. Alberici Constr. Co v. General Servs. Admin, GSBCA No. 12386, 94-2 BCA ¶ 26,776. Contracts that contain specifications for alternative CLINs are not conflicting. Fort Myer Construction Corporation v. U.S., Fed. Cir. 2000 (unpub. 24 Jan 2000).
4. The government cannot shift the responsibility for defective design specifications to a contractor through the use of a disclaimer. White v. Edsall Const. Co., Inc., 296 F.3d 1081 (Fed. Cir. 2002) (contractor is not obligated to "ferret out" hidden ambiguities and errors in the Government's specifications and designs.)

H. Liquidated Damages (LDs). FAR 11.502; FAR 36.206; FAR 52.211-12, DFARS Subpart 211.5.

1. The government may assess LDs if:
 - a. The parties intended to provide for LDs;
 - b. Anticipated damages attributable to untimely performance were uncertain or difficult to quantify at the time of award; and
 - c. The LDs bear a reasonable relationship to anticipated government losses resulting from delayed completion.

See D.E.W., Inc., ASBCA No. 38392, 92-2 BCA ¶ 24,840; Brooks Lumber Co., ASBCA No. 40743, 91-2 BCA ¶ 23,984; JEM Dev. Corp., ASBCA No. 42645, 91-3 BCA ¶ 24,428; Dave's Excavation, ASBCA No. 35956, 88-3 BCA ¶ 20,911; see also Kingston Constructors Inc. v. Washington Area Transport Authority, 930 F. Supp. 951 (Fed. Cir 1996); P&D Contractors, Inc. v. United States, 25 Cl. Ct. 237 (1992).

2. If the damage forecast was reasonable, the government may assess LDs even if it did not incur any actual damages. See Cegers v. United States, 7 Cl. Ct. 615 (1985); American Constr. Co., ENG BCA No. 5728, 91-2 BCA ¶ 24,009. But see Atlantic Maint. Co., ASBCA No. 40454, 96-2 BCA ¶ 28,323. Using a rate from an agency manual that is part of its procurement regulations is presumed reasonable. See Fred A. Arnold, Inc. v. United States, 18 Cl. Ct. 1 (1989), aff'd in part, 979 F.2d 217 (Fed. Cir. 1992); JEM Dev. Corp., ASBCA No. 45912, 94-1 BCA ¶ 26,407.
3. The government may not assess LDs if a project is substantially complete. See Hill Constr. Corp., ASBCA No. 43615, 93-3 BCA ¶ 25,973; Wilton Corp., ASBCA No. 39876, 93-2 BCA ¶ 25,897.
4. The government may not assess LDs if it is partly responsible for the completion delay. See H.G. Reynolds Co., Inc., ASBCA No. 42351, 93-2 BCA ¶ 25,797.
5. A contractor may be excused from LDs if it shows that the delay was: (a) excusable or beyond its control; and (b) without the fault or negligence of it or its subcontractors. See Potomac Marine & Aviation, Inc., ASBCA No. 42417, 93-2 BCA ¶ 25,865.
6. Contracting officers must ensure that project completion dates are reasonable to avoid having contractors "pad" their bids to protect against LDs.
7. Another contract clause that sets an alternate rate of compensation for standby time may be enforceable, even if it is quite high, if it serves a different purpose in the contract than a liquidated damages clause. See Stapp Towing Co., ASBCA No. 41584, 94-1 BCA ¶ 26,465.

I. Use/Possession Prior to Completion. FAR 52.236-11.

1. The government may take possession of a construction project prior to its completion (beneficial occupancy).
2. Possession does not necessarily constitute acceptance. See Tyler Constr. Co., ASBCA No. 39365, 91-1 BCA ¶ 23,646. The contractor must complete a project as required by the contract, including all “punch list” items. See Toombs & Co., ASBCA No. 34590, 91-1 BCA ¶ 23,403.
3. The contractor is not responsible for any loss or damage that the government causes. See Fraser Eng’g Co., supra.
4. The contractor may be due an equitable adjustment if possession by the government causes a delay.

X. CONCLUSION.

ATTACHMENT

DIFFERING SITE CONDITIONS (DSC)

What a Contractor Must Show to Recover for DSCs.

XI. TYPE I	XII. TYPE II
Contract documents either implicitly or explicitly indicate a particular site condition.	Conditions encountered were unusual physical conditions that were not known about at time of contract award.
Contractor reasonably interpreted and relied upon the contract indications.	Conditions differed materially from those ordinarily encountered.
Contractor encountered latent/subsurface conditions that differed materially from the conditions indicated in the contract and were reasonably unforeseeable.	
Contractor incurred increased costs that were solely attributable to the DSC.	Contractor incurred increased costs that were solely attributable to the DSC.
<u>Note:</u> 1. If the government made no representations and provided no information, contractor cannot recover. 2. If the contractor discovers the differing conditions prior to bid opening, reliance is unreasonable.	<u>Examples:</u> unexpected soil conditions, old dump at site, buried hazardous materials

NOTES:

1. DSC clause only covers conditions existing at the time of award. Acts of nature occurring after award are not DSCs.
2. A contractor may not recover if the contractor could have discovered the condition during a reasonable site investigation.
3. Recovery for DSC is not available if the contract does not contain the DSC clause.

CHAPTER 24

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CHAPTER 24

CONTRACT DISPUTES ACT (CDA) CLAIMS

I. INTRODUCTION. As a result of this instruction, the student will understand:

- A. The claims submission and dispute resolution processes provided by the CDA.
- B. The jurisdiction of the Armed Services Board of Contract Appeals (ASBCA) and the U.S. Court of Federal Claims (COFC) to decide appeals from contracting officer final decisions.
- C. The role of the contract attorney in addressing contractor claims, defending against contractor appeals, and prosecuting government claims.

II. OVERVIEW.

- A. Historical Development.
 - 1. Pre-Civil War Developments. Before 1855, government contractors had no forum in which to sue the United States. In 1855, the Congress created the Court of Claims as an Article I (legislative) court to consider claims against the United States and recommend private bills to Congress. Act of February 24, 1855, 10 Stat. 612. The service secretaries, however, continued to resolve most contract claims. As early as 1861, the Secretary of War appointed a board of three officers to consider and decide specific contract claims. See Adams v. United States, 74 U.S. 463 (1868). Upon receipt of an adverse board decision, a contractor's only recourse was to request a private bill from Congress.

2. Civil War Reforms. In 1863, Congress expanded the power of the Court of Claims by authorizing it to enter judgments against the United States. Act of March 3, 1863, 12 Stat. 765. In 1887, Congress passed the Tucker Act to expand and clarify the jurisdiction of the Court of Claims. Act of March 3, 1887, 24 Stat. 505, codified at 28 U.S.C. § 1491. In that Act, Congress granted the Court of Claims authority to consider monetary claims based on: (1) the Constitution; (2) an act of Congress; (3) an executive regulation; or (4) an express or implied-in-fact contract.¹ As a result, a government contractor could now sue the United States as a matter of right.
3. Disputes Clauses. Agencies responded to the Court of Claim's increased oversight by adding clauses to government contracts that appointed specific agency officials (e.g., the contracting officer or the service secretary) as the final decision-maker for questions of fact. The Supreme Court upheld the finality of these officials' decisions in Kihlberg v. United States, 97 U.S. 398 (1878). The tension between the agencies' desire to decide contract disputes without outside interference, and the contractors' desire to resolve disputes in the Court of Claims, continued until 1978. This tension resulted in considerable litigation and a substantial body of case law.
4. Boards of Contract Appeals (BCAs). During World War I (WWI), the War and Navy Departments established full-time BCAs to hear claims involving wartime contracts. The War Department abolished its board in 1922, but the Navy board continued in name (if not fact) until World War II (WWII). Between the wars, an interagency group developed a standard disputes clause. This clause made contracting officers' decisions final as to all questions of fact. WWII again showed that boards of contract appeals were needed to resolve the massive number of wartime contract disputes. See Penker Constr. Co. v. United States, 96 Ct. Cl. 1 (1942). Thus, the War Department created a board of contract appeals, and the Navy revived its board. In 1949, the Department of Defense (DOD) merged the two boards to form the current ASBCA.

¹ The Tucker Act did not give the Court of Claims authority to consider claims based on implied-in-law contracts.

5. Post-WWII Developments. In a series of cases culminating in Wunderlich v. United States, 342 U.S. 98 (1951), the Supreme Court upheld the finality (absent fraud) of factual decisions issued under the disputes clause by a department head or his duly authorized representative. Congress reacted by passing the Wunderlich Act, 41 U.S.C. §§ 321-322, which reaffirmed that the Court of Claims could review factual and legal decisions by agency BCAs. At about the same time, Congress changed the Court of Claims from an Article I (legislative) to an Article III (judicial) court. Pub. L. No. 83-158, 67 Stat. 226 (1953). Later, the Supreme Court clarified the relationship between the Court of Claims and the agency BCAs by limiting the jurisdiction of the boards to cases “arising under” remedy granting clauses in the contract. See Utah Mining and Constr. Co. v. United States, 384 U.S. 394 (1966).
6. The Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 601-613. Congress replaced the previous disputes resolution system with a comprehensive statutory scheme. Congress intended that the CDA:
 - a. Help induce resolution of more disputes by negotiation prior to litigation;
 - b. Equalize the bargaining power of the parties when a dispute exists;
 - c. Provide alternate forums suitable to handle the different types of disputes; and
 - d. Insure fair and equitable treatment to contractors and Government agencies. S. REP. NO. 95-1118, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5235.
7. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25. Congress overhauled the Court of Claims and created a new Article I court (i.e., the Claims Court) from the old Trial Division of the Court of Claims. Congress also merged the Court of Claims and the Court of Customs and Patent Appeals to create the Court of Appeals for the Federal Circuit (CAFC).²

² The Act revised the jurisdiction of the new courts substantially.

8. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 3921. Congress changed the name of the Claims Court to the United States Court of Federal Claims (COFC), and expanded the jurisdiction of the court to include the adjudication of nonmonetary claims.
9. Federal Acquisition Streamlining Act (FASA) of 1994, Pub. L. No. 103-355, 108 Stat. 3243. Congress increased the monetary thresholds for requiring CDA certifications and requesting expedited and accelerated appeals.³

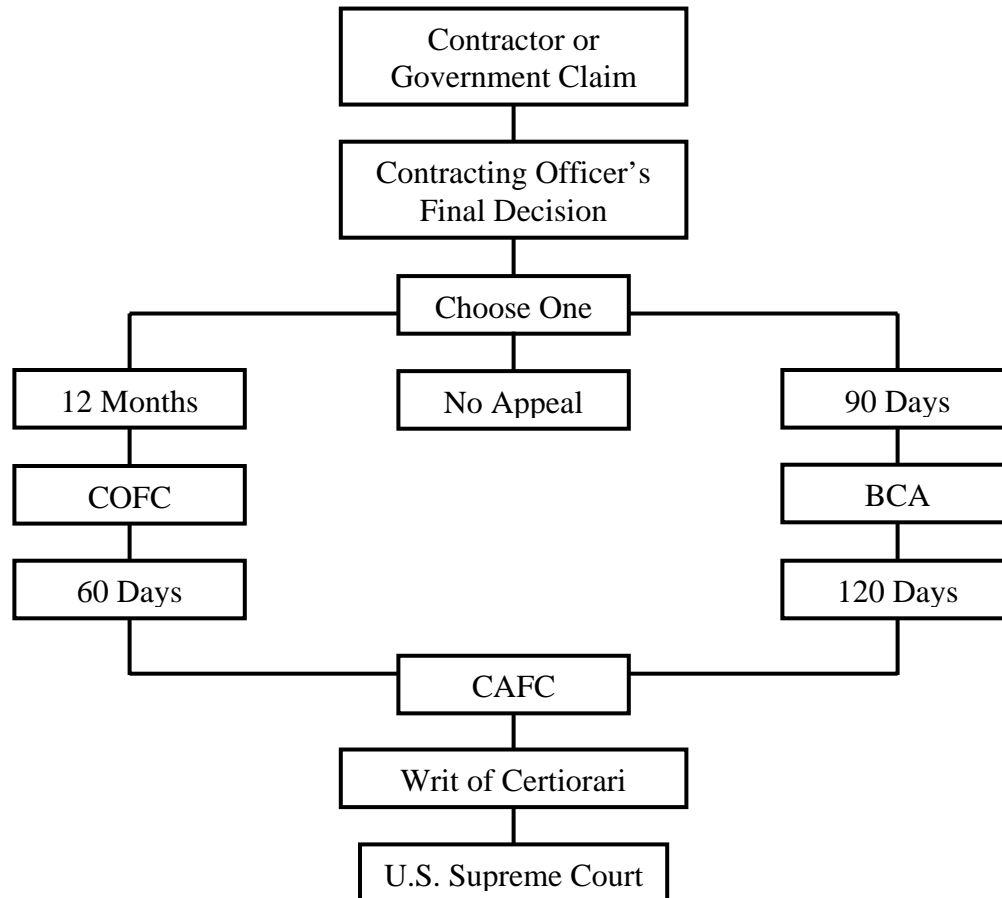
B. The Disputes Process.

1. The CDA establishes procedures and requirements for asserting and resolving claims subject to the Act.
2. Distinguishing bid protests from disputes.
 - a. In bid protests, disappointed bidders or offerors seek relief from actions that occur before contract award. See generally FAR Subpart 33.1.
 - b. In contract disputes, contractors seek relief from actions and events that occur after contract award. See generally FAR Subpart 33.2.
 - c. The Boards of Contract Appeals lack jurisdiction over bid protest actions. See United States v. John C. Grimberg, Inc., 702 F.2d 1362 (Fed. Cir. 1983) (stating that “the [CDA] deals with contractors, not with disappointed bidders); Ammon Circuits Research, ASBCA No. 50885, 97-2 BCA ¶ 29,318 (dismissing an appeal based on the contracting officer’s written refusal to award the contractor a research contract); RC 27th Ave. Corp., ASBCA No. 49176, 97-1 BCA ¶ 28,658 (dismissing an appeal for lost profits arising from the contracting officer’s failure to award the contractor a grounds maintenance services contract).

³ This Act represented Congress’s first major effort to reform the federal procurement process since it passed the CDA.

3. The disputes process flowchart.⁴

The Disputes Process



⁴ Note that for maritime contract actions, the CDA recognizes jurisdiction of district courts to hear appeals of ASBCA decisions, or to entertain suits filed following a contracting officer's final decision. See 41 U.S.C. § 603; See also *Marine Logistics, Inc. v. Secretary of the Navy*, 265 F.3d 1322 (Fed. Cir. 2001).

4. The Election Doctrine. The CDA provides alternative forums for challenging a contracting officer's final decision. Once a contractor files its appeal in a particular forum, this election is normally binding and the contractor can no longer pursue its claim in the other forum. The "election doctrine," however, does not apply if the forum originally selected lacked subject matter jurisdiction over the appeal. 41 U.S.C. §§ 606, 609(a)(1). See Bonneville Assocs. v. United States, 43 F.3d 649 (Fed. Cir. 1994) (dismissing the contractor's suit because the contractor originally elected to proceed before the GSBCA); see also Bonneville Assocs. v. General Servs. Admin., GSBCA No. 13134, 96-1 BCA ¶ 28,122 (refusing to reinstate the contractor's appeal), aff'd, Bonneville Assoc. v. United States, 165 F.3d 1360 (Fed. Cir. 1999).

III. APPLICABILITY OF THE DISPUTES CLAUSE.

A. Appropriated Fund Contracts.

1. The CDA applies to most express and implied-in-fact⁵ contracts.⁶ 41 U.S.C. § 602; FAR 33.203.
2. The Federal Acquisition Regulation (FAR) implements the CDA by requiring the contracting officer to include a Disputes clause in solicitations and contracts.⁷ FAR 33.215.
 - a. FAR 52.233-1, Disputes, requires the contractor to continue to perform pending resolution of disputes "arising under"⁸ the contract. See Attachment A.

⁵ An "implied-in-fact" contract is similar to an "express" contract. It requires: (1) "a meeting of the minds" between the parties; (2) consideration; (3) an absence of ambiguity surrounding the offer and the acceptance; and (4) an agency official with actual authority to bind the government. James L. Lewis v. United States, 70 F.3d 597 (Fed. Cir. 1995).

⁶ The CDA normally applies to contracts for: (1) the procurement of property; (2) the procurement of services; (3) the procurement of construction, maintenance, and repair work; and (4) the disposal of personal property. 41 U.S.C. § 602. Cf. G.E. Boggs & Assocs., Inc., ASBCA Nos. 34841, 34842, 91-1 BCA ¶ 23,515 (holding that the CDA did not apply because the parties did not enter into a contract for the procurement of property, but retaining jurisdiction pursuant to the disputes clause in the contract).

⁷ The CDA—and hence the Disputes clause—does not apply to: (1) tort claims that do not arise under or relate to an express or an implied-in-fact contract; (2) claims for penalties or forfeitures prescribed by statute or regulation that another federal agency is specifically authorized to administer, settle or determine; (3) claims involving fraud; and (4) bid protests. 41 U.S.C. §§ 602, 604, 605(a); FAR 33.203; FAR 33.209; FAR 33.210.

- b. FAR 52.233-1, Alternate I, Disputes, requires the contractor to continue to perform pending resolution of disputes “arising under or relating to”⁹ the contract.¹⁰ See Attachment A.

B. Nonappropriated Fund (NAF) Contracts.

1. Exchange Service contracts. The CDA applies to contracts with the Army and Air Force, Navy, Marine Corps, Coast Guard, and NASA Exchanges. See 41 U.S.C. § 602(a), 28 U.S.C. §§ 1346, 1491. The CDA does not apply to other nonappropriated fund contracts.¹¹ See e.g. Furash & Co. v. United States, 46 Fed. Cl. 518 (2000) (dismissing suit concerning contract with Federal Housing Finance Board).
2. In the past, the government often included a disputes clause in non-exchange NAF contracts, thereby giving a contractor the right to appeal a dispute to a BCA. See AR 215-4, Chapter 7, Section II; Charitable Bingo Assoc. Inc., ASBCA No. 53249, 01-2 BCA ¶ 31,478 (holding that the board had jurisdiction over a dispute with a NAF based on the inclusion of the disputes clause). Further, an agency directive granting NAF contractors a right of appeal has served as the basis for board jurisdiction, even when the contract contained no disputes clause. See DODD 5515.6; Recreational Enters., ASBCA No. 32176, 87-1 BCA ¶ 19,675 (board had jurisdiction over NAF contract dispute because DOD directives required contract clause granting a right of appeal).

⁸ “Arising under the contract ” is defined as falling within the scope of a contract clause and therefore providing a remedy for some event occurring during contract performance. RALPH C. NASH ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, at 8 (2d ed. 1998).

⁹ “Relating to the contract” means having a connection to the contract. The term encompasses claims that cannot be resolved through a contract clause, such as for breach of contract or correction of mistakes. Prior to passage of the CDA, contractors pursued relief for mutual mistake (rescission or reformation) under the terms of Pub. L. No. 85-804 (see FAR 33.205; FAR Part 50, Extraordinary Contractual Actions). RALPH C. NASH ET AL., THE GOVERNMENT CONTRACTS REFERENCE BOOK, at 438 (2d ed. 1998).

¹⁰ The Department of Defense (DOD) typically uses this clause for mission critical contracts, such as purchases of aircraft, naval vessels, and missile systems. DFARS 233.215.

¹¹ In addition, the CDA does not normally apply to: (1) Tennessee Valley Authority contracts; (2) contracts for the sale of real property; or (3) contracts with foreign governments or agencies. 41 U.S.C. § 602; FAR 33.203.

3. However, See Pacrim Pizza v. Secretary of the Navy, 304 F.3d 1291 (Fed. Cir. 2002) (CAFC refused to grant jurisdiction over non-exchange NAFI contract dispute; even though the contract included the standard disputes clause, the court held that only Congress can waive sovereign immunity, and the parties may not by contract bestow jurisdiction on a court). See also Sodexo Marriott Management, Inc., f/k/a Marriott Mgmt. Servs. V. United States, 61 Fed. Cl. 229 (2004) (holding that the non-appropriated funds doctrine barred the COFC from having jurisdiction over a NAF food service contract with the Marine Corps Recruit Morale, Welfare, and Recreation Center), Core Concepts of Florida, Inc. v. United States, 327 F.3d 1331 (Fed. Cir. 2003) (CAFC upheld a COFC decision that it lacked jurisdiction over a Federal Prison Industry (FPI) contract under the Tucker Act because FPI was a self-sufficient NAFI).

IV. CONTRACTOR CLAIMS.

A. Proper Claimants.

1. Only the parties to the contract (i.e., the prime contractor and the government) may normally submit a claim. 41 U.S.C. § 605(a).
2. Subcontractors.
 - a. A subcontractor cannot file a claim directly with the contracting officer. United States v. Johnson Controls, 713 F.2d 1541 (Fed. Cir. 1983) (dismissing subcontractor claim); see also Detroit Broach Cutting Tools, Inc., ASBCA No. 49277, 96-2 BCA ¶ 28,493 (holding that the subcontractor's direct communication with the government did not establish privity); Southwest Marine, Inc., ASBCA No. 49617, 96-2 BCA ¶ 28,347 (rejecting the subcontractor's assertion that the Suits in Admiralty Act gave it the right to appeal directly); cf. Department of the Army v. Blue Fox, 119 S. Ct. 687 (1999) (holding that a subcontractor may not sue the government directly by asserting an equitable lien on funds held by the government). But see Choe-Kelly, ASBCA No. 43481, 92-2 BCA ¶ 24,910 (holding that the board had jurisdiction to consider the subcontractor's unsponsored claim alleging an implied-in-fact contract).

- b. A prime contractor, however, can sponsor claims (also called “pass-through claims”) on behalf of its subcontractors. Erickson Air Crane Co. of Washington, Inc. v. United States, 731 F.2d 810 (Fed. Cir. 1984); McPherson Contractors, Inc., ASBCA No. 50830, 98-1 BCA ¶ 29,349 (appeal dismissed where prime stated it did not wish to pursue the appeal).
3. Sureties. Absent privity of contract, sureties may not file claims. Admiralty Constr., Inc. v. Dalton, 156 F.3d 1217 (Fed. Cir. 1998) (surety must finance contract completion or take over performance to invoke doctrine of equitable subrogation); William A. Ransom and Robert D. Nesen v. United States, 900 F.2d 242 (Fed. Cir. 1990) (discussing doctrine of equitable subrogation). However, see also Fireman’s Fund Insurance Co. v. England, 313 F.3d 1344 (Fed Cir. 2002) (although the doctrine of equitable subrogation is recognized by the COFC under the Tucker Act, the CDA only covers “claims by a contractor against the government relating to a contract,” thus a surety is not a “contractor” under the CDA).
4. Dissolved/Suspended Corporations. A corporate contractor must possess valid corporate status, as determined by applicable state law, to assert a CDA appeal. See Micro Tool Eng’g, Inc., ASBCA No. 31136, 86-1 BCA ¶ 18,680 (holding that a dissolved corporation could not sue under New York law). But cf. Fre’nce Mfg. Co., ASBCA No. 46233, 95-2 BCA ¶ 27,802 (allowing a “resurrected” contractor to prosecute the appeal). Allied Prod. Management, Inc., and Richard E. Rowan, J.V., DOT CAB No. 2466, 92-1 BCA ¶ 24,585 (allowing a contractor to appeal despite its suspended corporate status). In determining what powers survive dissolution, courts and boards look to the laws of the state of incorporation. See AEI Pacific, Inc., ASBCA No. 53806, 05-1 BCA ¶ 32,859 (holding that a dissolved Alaska corporation could initiate proceedings before the ASBCA as part of its “winding up its affairs” as allowed by the Alaskan Statute concerning the dissolution Alaskan Corporations.)

B. Definition of a Claim.

1. Contract Disputes Act. The CDA does not define the term “claim.” As a result, courts and boards look to the FAR for a definition. See Essex Electro Eng’rs, Inc. v. United States, 960 F.2d 1576 (Fed. Cir. 1992) (holding that the executive branch has authority to issue regulations implementing the CDA, to include defining the term “claim,” and that the FAR definition is consistent with the CDA).

2. FAR. The FAR defines a “claim” as “a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to a contract.” FAR 2.101; FAR 52.233-1.
- a. Claims arising under or relating to the contract include those supported by remedy granting clauses, breach of contract claims, and mistakes alleged after award.
 - b. A written demand (or written assertion) seeking the payment of money in excess of \$100,000 is not a valid CDA claim until the contractor properly certifies it. FAR 2.01.
 - c. A request for an equitable adjustment (REA) is not a “routine request for payment” and satisfies the FAR definition of “claim.” Reflectone, Inc. v. Dalton, 60 F.3d 1572 (Fed. Cir. 1995).
 - d. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a valid CDA claim. FAR 2.01; 52.233-1. A contractor may convert such a submission into a valid CDA claim if:
 - (1) The contractor complies with the submission and certification requirements of the Disputes clause; and
 - (2) The contracting officer:
 - (a) Disputes the submission as to either liability or amount; or
 - (b) Fails to act in a reasonable time. FAR 33.201; FAR 52.233-1. See S-TRON, ASBCA No. 45890, 94-3 BCA ¶ 26,957 (contracting officer’s failure to respond for 6 months to contractor’s “relatively simple” engineering change proposal (ECP) and REA was unreasonable).

C. Elements of a Claim.

1. The demand or assertion must be in writing. 41 U.S.C. § 605(a); FAR 33.201. See Honig Indus. Diamond Wheel, Inc., ASBCA No. 46711, 94-2 BCA ¶ 26,955 (granting the government's motion to strike monetary claims that the contractor had not previously submitted to the contracting officer); Clearwater Constructors, Inc. v. United States, 56 Fed. Cl. 303 (2003) (a subcontractor's letter detailing its dissatisfaction with a contracting officer's contract interpretation, attached to a contractor's cover-letter requesting a formal review and decision, constituted a non-monetary claim under the CDA).
2. Seeking as a matter of right,¹² one of the following:
 - a. Payment of money in a sum certain;
 - b. Adjustment or interpretation of contract terms. TRW, Inc., ASBCA Nos. 51172 and 51530, 99-2 BCA ¶ 30,047 (seeking decision on allowability and allocability of certain costs). Compare William D. Euille & Assocs., Inc. v. General Services Administration, GSBICA No. 15,261, 2000 GSBICA LEXIS 105 (May 3, 2000) (dispute concerning directive to remove and replace building materials proper contract interpretation claim), with Rockhill Industries, Inc., ASBCA No. 51541, 00-1 BCA ¶ 30,693 (money claim "masquerading as claim for contract interpretation"); or
 - c. Other relief arising under or relating to the contract. See General Electric Co.; Bayport Constr. Co., ASBCA Nos. 36005, 38152, 39696, 91-2 BCA ¶ 23,958 (demand for contractor to replace or correct latent defects under Inspection clause).

¹² Some submissions, such as cost proposals for work the government later decides it would like performed, would not be considered submissions seeking payment "as a matter of right." Reflectone v. Dalton, 60 F.3d 1572, n.7 (Fed. Cir. 1995).

- (1) Reformation or Rescission. See McClure Electrical Constructors, Inc. v. United States, 132 F.3d 709 (Fed. Cir. 1997); LaBarge Products, Inc. v. West, 46 F.3d 1547 (Fed. Cir. 1995) (ASBCA had jurisdiction to entertain reformation claim).
 - (2) Specific performance is not an available remedy. Western Aviation Maintenance, Inc. v. General Services Administration, GSBCA No. 14165, 98-2 BCA ¶ 29,816.
3. Submitted to the contracting officer for a decision. 41 U.S.C. § 605(a).
 - a. The Federal Circuit has interpreted the CDA's submission language as requiring the contractor to "commit" the claim to the contracting officer and "yield" to his authority to make a final decision. Dawco Constr., Inc. v. United States, 930 F.2d 872 (Fed. Cir. 1991).
 - b. The claim need not be sent only to the contracting officer, or directly to the contracting officer. If the contractor submits the claim to its primary government contact with a request for a contracting officer's final decision, and the primary contact delivers the claim to the contracting officer, the submission requirement can be met. Neal & Co. v. United States, 945 F.2d 385 (Fed. Cir. 1991) (claim requesting contracting officer's decision addressed to Resident Officer in Charge of Construction). See also D.L. Braughler Co., Inc. v. West, 127 F.3d 1476 (Fed. Cir. 1997) (submission to resident engineer not seeking contracting officer decision not a claim); J&E Salvage Co., 37 Fed. Cl. 256 (1997) (letter submitted to the Department of Justice rather than the Defense Reutilization and Marketing Office was not a claim).
 - c. Only receipt by the contracting officer triggers the time limits and interest provisions set forth in the CDA. See 41 U.S.C. § 605(c)(1), § 611.

- d. A claim should implicitly or explicitly request a contracting officer's final decision. See Ellett Constr. Co., Inc. v. United States, 93 F.3d 1537 (Fed. Cir. 1996) (holding that submission to the contracting officer is required, but the request for a final decision may be implied); Heyl & Patterson, Inc. v. O'Keefe, 986 F.2d 480, 483 (Fed. Cir. 1993) (stating that "a request for a final decision can be implied from the context of the submission"); Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992) (stating that no "magic words" are required "as long as what the contractor desires by its submissions is a final decision").
 - e. A contracting officer can't issue a valid final decision if the contractor explicitly states that it is not seeking a final decision. Fisherman's Boat Shop, Inc. ASBCA No. 50324, 97-2 BCA ¶ 29,257 (holding that the contracting officer's final decision was a nullity because the contractor did not intend for its letter submission to be treated as a claim).
4. Certification. A contractor must certify any claim that exceeds \$100,000. 41 U.S.C. § 605(c)(1); FAR 33.207. CDA certification serves to create the deterrent of potential liability for fraud and thereby discourage contractors from submitting unwarranted or inflated claims. See Fischbach & Moore Int'l Corp. v. Christopher, 987 F.2d 759 (Fed. Cir. 1993).
- a. Determining the Claim Amount.
 - (1) A contractor must consider the aggregate effect of increased and decreased costs to determine whether the claim exceeds the dollar threshold for certification.¹³ FAR 33.207(d).
 - (2) Claims that are based on a "common or related set of operative facts" constitute one claim. Placeway Constr. Corp., 920 F.2d 903 (Fed. Cir. 1990).

¹³ The contractor need not include the amount of any government claims in its calculations. J. Slotnik Co., VABCA No. 3468, 92-1 BCA ¶ 24,645.

- (3) A contractor may not split a single claim that exceeds \$100,000 into multiple claims to avoid the certification requirement. See, e.g., Walsky Constr. Co v. United States, 3 Ct. Cl. 615 (1983); Warchol Constr. Co. v. United States, 2 Cl. Ct. 384 (1983); D&K Painting Co., Inc., DOTCAB No. 4014, 98-2 BCA ¶ 30,064; Columbia Constr. Co., ASBCA No. 48536, 96-1 BCA ¶ 27,970; Jay Dee Militarywear, Inc., ASBCA No. 46539, 94-2 BCA ¶ 26,720.
- (4) Separate claims that total less than \$100,000 each require no certification, even if their combined total exceeds \$100,000. See Engineered Demolition, Inc. v. United States, 60 Fed.Cl. 822 (2204) (holding that appellants claim of \$69,047 and \$38,940 sponsored on behalf of appellant's sub-contractor were separate, having arose out of different factual predicates, each under \$100,000.), Phillips Constr. Co., ASBCA No. 27055, 83-2 BCA ¶ 16,618; B. D. Click Co., ASBCA No. 25609, 81-2 BCA ¶ 15,394.
- (5) The contracting officer cannot consolidate separate claims to create a single claim that exceeds \$100,000. See B. D. Click Co., Inc., ASBCA No. 25609, 81-2 BCA ¶ 15,395. Courts and boards, however, can consolidate separate claims for hearing to promote judicial economy.
- (6) A contractor need not certify a claim that grows to exceed \$100,000 after the contractor submits it to the contracting officer if:
- (a) The increase was based on information that was not reasonably available at the time of the initial submission; or

- (b) The claim grew as the result of a regularly accruing charge and the passage of time. See Tecom, Inc. v. United States, 732 F.2d 935 (Fed. Cir. 1984) (concluding that the contractor need not certify a \$11,000 claim that grew to \$72,000 after the government exercised certain options); AAI Corp. v. United States, 22 Cl. Ct. 541 (1991) (refusing to dismiss a claim that was \$0 when submitted, but increased to \$500,000 by the time the suit came before the court); Mulunesh Berhe, ASBCA No. 49681, 96-2 BCA ¶ 28,339.
- b. Certification Language Requirement. FAR 33.207(c). When required to do so, a contractor must certify that:
 - (1) The claim is made in good faith;
 - (2) The supporting data are accurate and complete to the best of the contractor's knowledge and belief;
 - (3) The amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable; and
 - (4) The person submitting the claim is duly authorized to certify the claim on the contractor's behalf.¹⁴
- c. Proper Certifying Official. A contractor may certify its claim through "any person duly authorized to bind the contractor with respect to the claim." 41 U.S.C. § 605(c)(7); FAR 33.207(e). See Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶ 30,088 (concluding that senior project manager was proper certifying official).

¹⁴ Absent extraordinary circumstances, courts and boards will not question the accuracy of the statements in a contractor's certification. D.E.W., Inc., ASBCA No. 37332, 94-3 BCA ¶ 27,004. A prime contractor need not agree with all aspects or elements of a subcontractor's claim. In addition, a prime contractor need not be certain of the government's liability, or the amount recoverable. The prime contractor need only believe that the subcontractor has good grounds to support its claim. See Oconto Elec., Inc., ASBCA No. 45856, 94-3 BCA ¶ 26,958 (holding that the prime contractor properly certified its subcontractor's claim, even though the official certifying the claim lacked personal knowledge of the amount claimed); see also Arnold M. Diamond, Inc. v. Dalton, 25 F.3d 1006 (Fed. Cir. 1994) (upholding the contractor's submission of a subcontractor's claim pursuant to a court order).

- d. No claim vs. Defective Certification. Tribunals treat differently those cases where an attempted certification is “substantially” compliant from those where the certification is either entirely absent or the language is intentionally or negligently defective.
 - (1) No claim.
 - (a) Absence of Certification. No valid claim exists. See FAR 33.201 (“Failure to certify shall not be deemed to be a defective certification.”); Hamza v. United States, 31 Fed. Cl. 315 (1994) (complete lack of an attempted certification); Eurostyle Inc., ASBCA No. 45934, 94-1 BCA ¶ 26,458 (“complete absence of any certification is not a mere defect which may be corrected”).
 - (b) Certifications made with intentional, reckless, or negligent disregard of CDA certification requirements are not correctable. See Walashek Industrial & Marine, Inc., ASBCA No. 52166, 00-1 BCA ¶ 30,728 (two prongs of certificate omitted or not fairly compliant); Keydata Sys, Inc. v. Department of the Treasury, GSBCA No. 14281-TD, 97-2 BCA ¶ 29,330 (denying the contractor’s petition for a final decision because it failed to correct substantial certification defects).
 - (2) Claim with “Defective” Certification. 41 U.S.C. § 605(c)(6). FAR 33.201 defines a defective certification as one “which alters or otherwise deviates from the language in 33.207(c) or which is not executed by a person duly authorized to bind the contractor with respect to the claim.”
 - (a) Exact recitation of the language of CDA 41 U.S.C. § 605(c), FAR 33.207(c) is not required—“substantial compliance” suffices. See Fischbach & Moore Int’l Corp. v. Christopher, 987 F.2d 759 (Fed. Cir. 1993) (substituting the word “understanding” for “knowledge” did not render certificate defective).

- (b) Technical defects are correctable. Examples include missing certifications when two or more claims are deemed to be a larger claim requiring certification, and certification by the wrong representative of the contractor. See H.R. Rep. No. 102-1006, 102d Cong., 2d Sess. 28, reprinted in 1992 U.S.C.C.A. at 3921, 3937.
- (c) Certifications used for other purposes may be acceptable even though they do not include the language required by the CDA. See James M. Ellett Const. Co., Inc. v. United States, 93 F.3d 1537 (Fed. Cir. 1996) (SF 1436 termination proposal not substantially deficient as a CDA certificate); Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶ 30,088. Compare SAE/Americon - Mid-Atlantic, Inc., GSBCA No. 12294, 94-2 BCA ¶ 26,890 (holding that the contractor's "certificate of current cost or pricing data" on SF 1411 was susceptible of correction, even though it did not include the first and third statements required for a proper CDA certification), with Scan-Tech Security, L.P. v. United States, 46 Fed. Cl. 326 (2000) (suit dismissed after court equated use of SF 1411 with no certification).
- (d) The CO need not render a final decision if he notifies the contractor in writing of the defect within 60 days after receipt of the claim. 41 U.S.C. § 605 (c)(6).
- (e) Interest on a claim with a defective certification shall be paid from the date the contracting officer initially received the claim. FAR 33.208(c).
- (f) A defect will not deprive a court or board of jurisdiction, but it must be corrected before entry of a court's final judgment or a board's decision. 41 U.S.C. § 605 (c)(6).

D. Demand for a Sum Certain.

1. Where the essence of a dispute is the increased cost of performance, the contractor must demand a sum certain as a matter of right. Compare Essex Electro Eng'rs, Inc. v. United States, 22 Cl. Ct. 757, aff'd, 960 F.2d 1576 (Fed. Cir. 1992) (holding that a cost proposal for possible future work did not seek a sum certain as a matter of right); with J.S. Alberici Constr. Co., ENG BCA No. 6179, 97-1 BCA ¶ 28,639, recon. denied, ENG BCA No. 6179-R, 97-1 BCA ¶ 28,919 (holding that a request for costs associated with ongoing work, but not yet incurred, was a sum certain); McDonnell Douglas Corp., ASBCA No. 46582, 96-2 BCA ¶ 28,377 (holding that a sum certain can exist even if the contractor has not yet incurred any costs); Fairchild Indus., ASBCA No. 46197, 95-1 BCA ¶ 27,594 (holding that a request based on estimated future costs was a sum certain).

2. A claim states a sum certain if:
 - a. The government can determine the amount of the claim using a simple mathematical formula. Metric Constr. Co. v. United States, 1 Cl. Ct. 383 (1983); Mulunesh Berhe, ASBCA No. 49681, 96-2 BCA ¶ 28,339 (simple multiplication of requested monthly rate for lease); Jepco Petroleum, ASBCA No. 40480, 91-2 BCA ¶ 24,038 (claim requesting additional \$3 per linear foot of excavation, when multiplied by total of 10,000 feet, produced sum certain).

 - b. Enlarged claim doctrine. Under this doctrine, a BCA or the COFC may exercise jurisdiction over a dispute that involves a sum in excess of that presented to the contracting officer for a final decision if:
 - (1) The increase in the amount of the claim is based on the same set of operative facts previously presented to the contracting officer; and

 - (2) The contractor neither knew nor reasonably should have known, at the time when the claim was presented to the contracting officer, of the factors justifying an increase in the amount of the claim. Johnson Controls World Services, Inc. v. United States, 43 Fed. Cl. 589 (1999). See also Stencel Aero Engineering Corp., ASBCA No. 28654, 84-1 BCA ¶ 16,951 (finding essential character or elements of the certified claim had not been changed).

- E. Supporting Data. Invoices, detailed cost breakdowns, and other supporting financial documentation need not accompany a CDA claim as a jurisdictional prerequisite. H.L. Smith v. Dalton, 49 F.3d 1563 (Fed. Cir. 1995) (contractor's failure to provide CO with additional information "simply delayed action on its claims"); John T. Jones Constr. Co., ASBCA No. 48303, 96-1 BCA ¶ 27,997 (stating that the contracting officer's desire for more information did not invalidate the contractor's claim submission).
- F. Settlement.
1. Agencies should attempt to resolve claims by mutual agreement, if possible. FAR 33.204; FAR 33.210. See Pathman Constr. Co., Inc. v. United States, 817 F.2d 1573 (Fed. Cir. 1987) (stating that a "major purpose" of the CDA is to "induce resolution of contract disputes with the government by negotiation rather than litigation").
 2. Only contracting officers or their authorized representatives may normally settle contract claims. See FAR 33.210; see also J.H. Strain & Sons, Inc., ASBCA No. 34432, 88-3 BCA ¶ 20,909 (refusing to enforce a settlement agreement that the agency's attorney entered into without authority). The Department of Justice (DOJ), however, has plenary authority to settle cases pending before the COFC. See Executive Business Media v. Department of Defense, 3 F.3d 759 (4th Cir. 1993).
 3. Contracting officers are authorized, within the limits of their warrants, to decide or resolve all claims arising under or relating to the contract except for:
 - a. A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or
 - b. The settlement, compromise, payment or adjustment of any claim involving fraud.¹⁵ FAR 33.210.

G. Interest.

¹⁵ When a claim is suspected to be fraudulent, the contracting officer shall refer the matter to the agency official responsible for investigating fraud. FAR 33.209. To justify a stay in a Board proceeding, the movant has the burden to show there are substantially similar issues, facts and witnesses in civil and criminal proceedings, and there is a need to protect the criminal litigation which overrides any injury to the parties by staying the civil litigation. Afro-Lecon, Inc. v. United States, 820 F.2d 1198 (Fed. Cir. 1987); T. Iida Contracting, Ltd., ASBCA No. 51865, 00-1 BCA ¶ 30,626.

1. Interest on CDA claims is calculated every six months based on a rate established by the Secretary of the Treasury pursuant to Pub. L. No. 92-41, 85 Stat. 97. 41 U.S.C. § 611; FAR 33.208.
2. Established interest rates can be found at www.publicdebt.treas.gov.
3. Interest may begin to accrue on costs before the contractor incurs them. See Servidone Constr. Corp. v. United States, 931 F.2d 860 (Fed. Cir. 1991) (stating that 41 U.S.C. § 611 “sets a single, red-letter date for the interest of all amounts found due by a court without regard to when the contractor incurred the costs”); see also Caldera v. J.S. Alberici Constr. Co., 153 F.3d 1381 (Fed Cir. 1998) (holding that 41 U.S.C. § 611 “trumps” conflicting regulations that prohibit claims for future costs).

H. Termination for Convenience (T4C) Settlement Proposals. FAR 49.206.

1. A contractor may submit a settlement proposal for costs associated with the termination of a contract for the convenience of the government. FAR 49.206-1; FAR 49.602-1. See Standard Form (SF) 1435, Settlement Proposal (Inventory Basis); SF 1436, Settlement Proposal (Total Cost Basis); SF 1437, Settlement Proposal for Cost-Reimbursement Type Contracts; SF 1438, Settlement Proposal (Short Form).
2. Courts and boards consider T4C settlement proposals to be “nonroutine” submissions under the CDA. See Ellett, 93 F.3d at 1542 (stating that “it is difficult to conceive of a less routine demand for payment than one which is submitted when the government terminates a contract for its convenience”).

- a. Courts and boards, however, do not consider T4C settlement proposals to be CDA claims when submitted because contractors normally do not submit them for a contracting officer's final decision—they submit them to facilitate negotiations. See Ellett Constr. Co., Inc. v. United States, 93 F.3d 1537 (Fed. Cir. 1996) (T4C settlement proposal was not a claim because the contractor did not submit it to the contracting officer for a final decision); see also Walsky Constr. Co. v. United States, 173 F.3d 1312 (Fed. Cir. 1999) (T4C settlement proposal was not a claim because it had not yet been the subject of negotiations with the government); cf. Medina Constr., Ltd. v. United States, 43 Fed. Cl. 537, 551 (1999) (parties may reach an impasse without entering into negotiations if allegations of fraud prevent the contracting officer from entering into negotiations).
 - b. A T4C settlement proposal may “ripen” into a CDA claim once settlement negotiations reach an impasse. See Ellett, 93 F.3d at 1544 (holding that the contractor's request for a final decision following ten months of “fruitless negotiations” converted its T4C settlement proposal into a claim); Metric Constructors, Inc., ASBCA No. 50843, 98-2 BCA ¶ 30,088 (holding that a contractor's T4C settlement proposal ripened into a claim when the contracting officer issued a unilateral contract modification following the parties' unsuccessful negotiations); cf. FAR 49.109-7(f) (stating that a contractor may appeal a “settlement by determination” under the Disputes clause unless the contractor failed to submit its T4C settlement proposal in a timely manner).
3. Certification. If a CDA certification is required, the contractor may rely on the standard certification in whichever SF the FAR requires it to submit. See Ellett, 93 F.3d at 1545 (rejecting the government's argument that proper certification of a T4C settlement proposal is a jurisdictional prerequisite); see also Metric Constructors, Inc., supra. (concluding that the contractor could “correct” the SF 1436 certification to comply with the CDA certification requirements).

4. Interest. The FAR precludes the government from paying interest under a settlement agreement or determination; however, the FAR permits the government to pay interest on a contractor's successful appeal. FAR 49.112-2(d). Therefore, the government cannot pay interest on a T4C settlement proposal unless it "ripens" into a CDA claim and the contractor successfully appeals to the ASBCA or the COFC. See Ellett, 93 F.3d at 1545 (recognizing the fact that T4C settlement proposals are treated disparately for interest purposes); see also Central Envtl. Inc., ASBCA 51086, 98-2 BCA ¶ 29,912 (concluding that interest did not begin to run until after the parties' reached an impasse and the contractor requested a contracting officer's final decision).

I. Statute of Limitations.

1. In 1987, the Federal Circuit concluded that the six-year statute of limitations in the Tucker Act does not apply to CDA appeals. Pathman Constr. Co. v. United States, 817 F.2d 1573 (Fed. Cir. 1987).
2. In 1994, Congress revised the CDA to impose a six-year statute of limitations. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified at 40 U.S.C. § 605). See FAR 33.206; see also Motorola, Inc. v. West, 125 F.3d 1470 (Fed. Cir. 1997).
 - a. For contracts awarded on or after 1 October 1995, a contractor must submit its claim within six years of the date the claim accrues.
 - b. This statute of limitations provision does not apply to government claims based on contractor claims involving fraud.

V. GOVERNMENT CLAIMS.

A. Requirement for Final Decision. 41 U.S.C. § 605(a); FAR 52.233-1(d)(1).

1. The government may assert a claim against a contractor; however, the claim must be the subject of a contracting officer's final decision.
2. Some government actions are immediately appealable.

- a. Termination for Default. A contracting officer's decision to terminate a contract for default is an immediately appealable government claim. Independent Mfg. & Serv. Cos. of Am., Inc., ASBCA No. 47636, 94-3 BCA ¶ 27,223. See Malone v. United States, 849 F.2d 1441, 1443 (Fed. Cir. 1988); cf. Educators Assoc., Inc. v. United States, 41 Fed. Cl. 811 (1998) (dismissing the contractor's suit as untimely because the contractor failed to appeal within 12 months of the date it received the final termination decision).
- b. Withholding Monies. A contracting officer's decision to withhold monies otherwise due the contractor is an immediately appealable government claim. Placeway Constr. Corp. United States, 920 F.2d 903, 906 (Fed. Cir. 1990); Sprint Communications Co., L.P. v. General Servs. Admin., GSBCA No. 14263, 97-2 BCA ¶ 29,249.
- c. Cost Accounting Standards (CAS) Determination. A contracting officer's decision regarding the allowability of costs under the CAS is often an immediately appealable government claim. See Newport News Shipbuilding and Dry Dock Co. v. United States, 44 Fed. Cl. 613 (1999) (government's demand that the contractor change its accounting for all of its CAS-covered contracts was an appealable final decision); Litton Sys., Inc., ASBCA No. 45400, 94-2 BCA ¶ 26,895 (holding that the government's determination was an appealable government claim because the government was "seeking, as a matter of right, the adjustment or interpretation of contract terms"); cf. Aydin Corp., ASBCA No. 50301, 97-2 BCA ¶ 29,259 (holding that the contracting officer's failure to present a claim arising under CAS was a nonjurisdictional error).
- d. Miscellaneous Demands. See Bean Horizon-Weeks (JV), ENG BCA No. 6398, 99-1 BCA ¶ 30,134 (holding that a post-appeal letter demanding repayment for improper work was an appealable final decision); Outdoor Venture Corp., ASBCA No. 49756, 96-2 BCA ¶ 28,490 (holding that the government's demand for warranty work was a claim that the contractor could immediately appeal); Sprint Communications Co. v. General Servs. Admin., GSBCA No. 13182, 96-1 BCA ¶ 28,068. But see Boeing Co., 25 Cl. Ct. 441 (1992) (holding that a post-termination letter demanding the return of unliquidated progress payments was not appealable); Iowa-Illinois Cleaning Co. v. General Servs. Admin., GSBCA No. 12595, 95-2 BCA ¶ 27,628 (holding that government deductions for deficient performance are not appealable absent a contracting officer's final decision).

3. As a general rule, the government may not assert a counterclaim that has not been the subject of a contracting officer's final decision.
- B. Contractor Notice. Assertion of a government claim is usually a two-step process. A demand letter gives the contractor notice of the potential claim and an opportunity to respond. If warranted, the final decision follows. See FAR 33.211(a) ("When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary"); Instruments & Controls Serv. Co., ASBCA No. 38332, 89-3 BCA ¶ 22,237 (dismissing appeal because final decision not preceded by demand); see also Bean Horizon-Weeks (JV), ENG BCA No. 6398, 99-1 BCA ¶ 30,134; B.L.I. Constr. Co., ASBCA No. 40857, 92-2 BCA ¶ 24,963 (stating that "[w]hen the Government is considering action, the contractor should be given an opportunity to state its position, express its views, or explain, argue against, or contest the proposed action").
 - C. Certification. Neither party is required to certify a government claim. 41 U.S.C. §§ 605(a); 605(c)(1). See Placeway Constr. Corp., 920 F.2d at 906; Charles W. Ware, GSBCA No. 10126, 90-2 BCA ¶ 22,871. A contractor, however, must certify its request for interest on monies deducted or withheld by the government. General Motors Corp., ASBCA No. 35634, 92-3 BCA ¶ 25,149.
 - D. Interest. Interest on a government claim begins to run when the contractor receives the government's initial written demand for payment. FAR 52.232-17.
 - E. Finality. Once the contracting officer's decision becomes final (i.e., once the appeal period has passed), the contractor cannot challenge the merits of that decision judicially. 41 U.S.C. § 605(a). See Seaboard Lumber Co. v. United States, 903 F.2d 1560, 1562 (Fed. Cir. 1990); L.A. Constr., Inc., 95-1 BCA ¶ 27,291 (holding that the contractor's failure to appeal the final decision in a timely manner deprived the board of jurisdiction, even though both parties testified on the merits during the hearing).

VI. FINAL DECISIONS.

- A. General. The contracting officer must issue a written final decision on all claims. 51 U.S.C. § 605(a); FAR 33.206; FAR 33.211(a). See Tyger Constr. Co., ASBCA No. 36100, 88-3 BCA ¶ 21,149. But cf. McDonnell Douglas Corp., ASBCA No. 44637, 93-2 BCA ¶ 25,700 (dismissing the contractor's appeal from a government claim for noncompliance with CAS because the procuring contracting officer issued the final decision instead of the cognizant administrative contracting officer as required by the FAR and DFARS).

- B. Time Limits. A contracting officer must issue a final decision on a contractor's claim within certain statutory time limits. 41 U.S.C. § 605(c); FAR 33.211.
1. Claims of \$100,000 or less. The contracting officer must issue a final decision within 60 days.
 2. Certified Claims Exceeding \$100,000. The contracting officer must take one of the following actions within 60 days:
 - a. Issue a final decision; or
 - b. Notify the contractor of a firm date by which the contracting officer will issue a final decision.¹⁶ See Boeing Co. v. United States, 26 Cl. Ct. 257 (1992); Aerojet Gen. Corp., ASBCA No. 48136, 95-1 BCA ¶ 27,470 (concluding that the contracting officer failed to provide a firm date where the contracting officer made the timely issuance of a final decision contingent on the contractor's cooperation in providing additional information); Inter-Con Security Sys., Inc., ASBCA No. 45749, 93-3 BCA ¶ 26,062 (concluding that the contracting officer failed to provide a firm date where the contracting officer merely promised to render a final decision within 60 days of receiving the audit).
 3. Uncertified and Defectively Certified Claims Exceeding \$100,000.
 - a. FAR 33.211(e) The contracting officer has no obligation to issue a final decision on a claim that exceeds \$100,000 if the claim is:
 - (1) Uncertified; or
 - (2) Defectively certified.

¹⁶ The contracting officer must issue the final decision within a reasonable period. What constitutes a "reasonable" period depends on the size and complexity of the claim, the adequacy of the contractor's supporting data, and other relevant factors. 41 U.S.C. § 605c(3); FAR 33.211(d). See Defense Sys. Co., ASBCA No. 50534, 97-2 BCA ¶ 28,981 (holding that nine months to review a \$72 million claim was reasonable).

- b. If the claim is defectively certified, the contracting officer must notify the contractor, in writing, within 60 days of the date the contracting officer received the claim of the reason(s) why any attempted certification was defective.

4. Failure to Issue a Final Decision. FAR 33.211(g)

- a. If the contracting officer fails to issue a final decision within a reasonable period of time, the contractor can:
 - (1) Request the tribunal concerned to direct the contracting officer to issue a final decision. 41 U.S.C. § 605(c)(4); FAR 33.211(f). See American Industries, ASBCA No. 26930-15, 82-1 BCA ¶ 15,753.
 - (2) Treat the contracting officer's failure to issue a final decision as an appealable final decision (i.e., a "deemed denial"). 41 U.S.C. § 605(c)(5); FAR 33.211(g). See Aerojet Gen. Corp., ASBCA No. 48136, 95-1 BCA ¶ 27,470.
- b. A BCA, however, cannot direct the contracting officer to issue a more detailed final decision than the contracting officer has already issued. A.D. Roe Co., ASBCA No. 26078, 81-2 BCA ¶ 15,231.

C. Format. 41 U.S.C. § 605(a); FAR 33.211(a)(4).

- 1. The final decision must be written. Tyger Constr. Co., ASBCA No. 36100, 88-3 BCA ¶ 21,149.
- 2. In addition, the final decision must:
 - a. Describe the claim or dispute;
 - b. Refer to the pertinent or disputed contract terms;
 - c. State the disputed and undisputed facts;

- d. State the decision and explain the contracting officer's rationale;
- e. Advise the contractor of its appeal rights; and
- f. Demand the repayment of any indebtedness to the government.

3. Rights Advisement.

- a. FAR 33.211(a)(4)(v) specifies that the final decision should include a paragraph substantially as follows:

This is a final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number. With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's small claim procedure for claims of \$50,000 or less or its accelerated procedure for claims of \$100,000 or less. Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 603, regarding Maritime Contracts) within 12 months of the date you receive this decision.

- b. Failure to properly advise the contractor of its appeal rights may prevent the "appeals clock" from starting. If the contracting officer's rights advisory is deficient, the contractor must demonstrate that, but for its detrimental reliance upon the faulty advice, its appeal would have been timely. Decker & Co. v. West, 76 F.3d 1573 (Fed. Cir. 1996).

4. Specific findings of fact are not required and, if made, are not binding on the government in any subsequent proceedings. See Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994) (concluding that admissions favorable to the contractor do not constitute evidence of government liability).

D. Delivery. 41 U.S.C. § 605(a); FAR 33.211(b).

1. The contracting officer must mail (or otherwise furnish) a copy of the final decision to the contractor. See Images II, Inc., ASBCA No. 47943, 94-3 BCA ¶ 27,277 (holding that receipt by the contractor's employee constituted proper notice).
2. The contracting officer should use certified mail, return receipt requested; however, hand delivery and facsimile (FAX) transmission are also acceptable means of delivery.
3. The contracting officer should preserve all evidence of the date the contractor received the contracting officer's final decision. See Omni Abstract, Inc., ENG BCA No. 6254, 96-2 BCA ¶ 28,367 (relying on a government attorney's affidavit to determine when the 90-day appeals period started).
 - a. When hand delivering the final decision, the contracting officer should require the contractor to sign for the document.
 - b. When using a FAX transmission, the contracting officer should confirm receipt and memorialize the confirmation in a written memorandum. See Mid-Eastern Indus., Inc., ASBCA No. 51287, 98-2 BCA ¶ 29,907 (concluding that the government established a prima facie case by presenting evidence to show that it successfully transmitted the final decision to the contractor's FAX number); see also Public Service Cellular, Inc., ASBCA No. 52489, 00-1 BCA ¶ 30,832 (transmission report not sufficient evidence of receipt).

E. Independent Act of a Contracting Officer.

1. The final decision must be the contracting officer's personal, independent act. Compare PLB Grain Storage Corp. v. Glickman, 113 F.3d 1257 (Fed. Cir. 1997) (unpub.) (holding that a termination was proper even though a committee of officials directed it); Charitable Bingo Associates d/b/a Mr. Bingo, Inc., ASBCA Nos. 53249, 53470, 05-01 BCA 32,863 (finding the Contracting Officer utilized independent judgment in terminating appellant's contract after the Assistant Secretary of the Army (MR&A) issued a policy memorandum prohibiting contractor-operated bingo programs within the Army MWR programs) with Climatic Rainwear Co. v. United States, 88 F. Supp. 415 (Ct. Cl. 1950) (holding that a termination was improper because the contracting officer's attorney prepared the termination findings without the contracting officer's participation).

2. The contracting officer should seek assistance from engineers, attorneys, auditors, and other advisors. See FAR 1.602-2 (requiring the contracting officer to request and consider the advice of "specialists," as appropriate); FAR 33.211(a)(2) (requiring the contracting officer to seek assistance from "legal and other advisors"); see also Pacific Architects & Eng'rs, Inc. v. United States, 203 Ct. Cl. 499, 517 (1974) (opining that it is unreasonable to preclude the contracting officer from seeking legal advice); Prism Constr. Co., ASBCA No. 44682, 97-1 BCA ¶ 28,909 (indicating that the contracting officer is not required to independently investigate the facts of a claim before issuing final decision); Environmental Devices, Inc., ASBCA No. 37430, 93-3 BCA ¶ 26,138 (approving the contracting officer's communications with the user agency prior to terminating the contract for default); cf. AR 27-1, para. 15-5a (noting the "particular importance" of the contracts attorney's role in advising the contracting officer on the drafting of a final decision).

F. Finality. 41 U.S.C. § 605(b).

1. A final decision is binding and conclusive unless timely appealed.

2. Reconsideration.
 - a. A contracting officer may reconsider, withdraw, or rescind a final decision before the expiration of the appeals period. General Dynamics Corp., ASBCA No. 39866, 91-2 BCA ¶ 24,017. Cf. Daniels & Shanklin Constr. Co., ASBCA No. 37102, 89-3 BCA ¶ 22,060 (rejecting the contractor's assertion that the contracting officer could not withdraw a final decision granting its claim, and indicating that the contracting officer has an obligation to do so if the final decision is erroneous).

- b. The contracting officer's rescission of a final decision, however, will not necessarily deprive a BCA of jurisdiction because jurisdiction vests as soon as the contractor files its appeal. See Security Servs., Inc., GSBCA No. 11052, 92-1 BCA ¶ 24,704; cf. McDonnell Douglas Astronautics Co., ASBCA No. 36770, 89-3 BCA ¶ 22,253 (indicating that the board would sustain a contractor's appeal if the contracting officer withdrew the final decision after the contractor filed its appeal).
 - c. A contracting officer may vacate his or her final decision unintentionally by agreeing to meet with the contractor to discuss the matters in dispute. See Sach Sinha and Assocs., ASBCA No. 46916, 95-1 BCA ¶ 27,499 (finding that the contracting officer "reconsidered" her final decision after she met with the contractor as a matter of "business courtesy" and requested the contractor to submit its proposed settlement alternatives in writing); Royal Int'l Builders Co., ASBCA No. 42637, 92-1 BCA ¶ 24,684 (holding that the contracting officer "destroyed the finality of his initial decision" by agreeing to meet with the contractor, even though the meeting was cancelled and the contracting officer subsequently sent the contractor a letter stating his intent to stand by his original decision).
 - d. To restart the appeal period after reconsidering a final decision, the contracting officer must issue a new final decision. Information Sys. & Networks Corp. v. United States, 17 Cl. Ct. 527 (1989); Sach Sinha and Assocs., ASBCA No. 46916, 95-1 BCA ¶ 27,499; Birken Mfg. Co., ASBCA No. 36587, 89-2 BCA ¶ 21,581.
3. The Fulford Doctrine. A contractor may dispute an underlying default termination as part of a timely appeal from a government demand for excess procurement costs, even though the contractor failed to appeal the underlying default termination in a timely manner. Fulford Mfg. Co., ASBCA No. 2143, 6 CCF ¶ 61,815 (May 20, 1955); Deep Joint Venture, GSBCA No. 14511, 02-2 BCA ¶ 31,914 (GSBCA confirms validity of the Fulford doctrine for post-CDA terminations).

VII. APPEALS TO THE ARMED SERVICES BOARD OF CONTRACT APPEALS (ASBCA).

- A. The Right to Appeal. 41 U.S.C. § 606. A contractor may appeal a contracting officer's final decision to an agency BCA.

- B. The Armed Services Board of Contract Appeals (ASBCA).
1. The ASBCA consists of 25-30 administrative judges who dispose of approximately 800-900 appeals per year.
 2. ASBCA judges specialize in contract disputes and come from both the government and private sectors. Each judge has at least five years of experience working in the field of government contract law.
 3. The Rules of the Armed Services Board of Contract Appeals appear in Appendix A of the DFARS.
- C. Jurisdiction. 41 U.S.C. § 607(d). The ASBCA has jurisdiction to decide appeals regarding contracts made by:
1. The Department of Defense; or
 2. An agency that has designated the ASBCA to decide the appeal.
- D. Standard of Review. The ASBCA will review the appeal de novo. See 41 U.S.C. § 605(a) (indicating that the contracting officer's specific findings of fact are not binding in any subsequently proceedings); see also Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994) (en banc); Precision Specialties, Inc., ASBCA No. 48717, 96-1 BCA ¶ 28,054 (final decision retains no presumptive evidentiary weight nor is it binding on the Board).
- E. Perfecting an Appeal.
1. Requirement. A contractor's notice of appeal (NOA) shall be mailed or otherwise furnished to the Board within 90 days from date of receipt of the final decision. A copy shall be furnished to the contracting officer. 41 U.S.C. § 606; ASBCA Rule 1(a). See Cosmic Constr. Co. v. United States, 697 F.2d 1389 (Fed. Cir. 1982) (90 day filing requirement is statutory and cannot be waived by the Board); Rex Sys, Inc., ASBCA No. 50456, 98-2 BCA ¶ 29,956 (refusing to dismiss a contractor's appeal simply because the contractor failed to send a copy of the NOA to the contracting officer).

2. Filing an appeal with the contracting officer can satisfy the Board's notice requirement. See Hellenic Express, ASBCA No. 47129, 94-3 BCA ¶ 27,189 (citing Yankee Telecomm. Lab., ASBCA No. 25240, 82-2 BCA ¶ 15,515, for the proposition that "filing an appeal with the contracting officer is tantamount to filing with the Board"); cf. Brunner Bau GmbH, ASBCA No. 35678, 89-1 BCA ¶ 21,315 (holding that notice to the government counsel was a filing).

3. Methods of filing.
 - a. Mail. The written NOA can be sent to the ASBCA or to the contracting officer via the U.S. Postal Service. See Thompson Aerospace, Inc., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (NOA mailed to KO timely filed).

 - b. Otherwise furnishing, such as through commercial courier service. North Coast Remfg., Inc., ASBCA No. 38599, 89-3 BCA ¶ 22,232 (NOA delivered by Federal Express courier service not accorded same status as U.S. mail service and was therefore untimely).

4. Contents. An adequate notice of appeal must:
 - a. Be in writing. See Lows Enter., ASBCA No. 51585, 00-1 BCA ¶ 30,622 (holding that verbal notice is insufficient).

 - b. Express dissatisfaction with the contracting officer's decision;

 - c. Manifest an intent to appeal the decision to a higher authority, see e.g., McNamara-Lunz Vans & Warehouse, Inc., ASBCA No. 38057, 89-2 BCA ¶ 21,636 (concluding that a letter stating that "we will appeal your decision through the various avenues open to us" adequately expressed the contractor's intent to appeal); cf. Stewart-Thomas Indus., Inc., ASBCA No. 38773, 90-1 BCA ¶ 22,481 (stating that the intent to appeal to the board must be unequivocal); Birken Mfg. Co., ASBCA No. 37064, 89-1 BCA ¶ 21,248 (concluding that an electronic message to the termination contracting officer did not express a clear intent to appeal); and

 - d. Be timely. 41 U.S.C. § 606; ASBCA Rule 1(a); Thompson Aerospace, Inc., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232.

- (1) A contractor must file an appeal with a BCA within 90 days of the date it received the contracting officer's final decision. 41 U.S.C. § 606.
- (2) In computing the time taken to appeal (See ASBCA Rule 33(b)):
 - (a) Exclude the day the contractor received the contracting officer's final decision; and
 - (b) Count the day the contractor mailed (evidenced by postmark by U.S. Postal Service) the NOA or that the Board received the NOA.
 - (c) If the 90th day is a Saturday, Sunday, or legal holiday, the appeals period shall run to the end of the next business day.

e. The NOA should also:

- (1) Identify the contract, the department or agency involved in the dispute, the decision from which the contractor is appealing, and the amount in dispute; and
- (2) Be signed by the contractor taking the appeal or the contractor's duly authorized representative or attorney.

5. The Board liberally construes appeal notices. See Thompson Aerospace, Inc., ASBCA Nos. 51548, 51904, 99-1 BCA ¶ 30,232 (Board jurisdiction where timely mailing of NOA to KO, despite Board rejecting its NOA mailing).

F. Regular Appeals.

1. Docketing. ASBCA Rule 3. The Recorder assigns a docket number and notifies the parties in writing.
2. Rule 4 (R4) File. ASBCA Rule 4.

- a. The contracting officer must assemble and transmit an appeal file to the ASBCA and the appellant within 30 days of the date the government receives the docketing notice.
 - b. The R4 file should contain the relevant documents (e.g., the final decision, the contract, and the pertinent correspondence).
 - c. The appellant may supplement the R4 file within 30 days of the date it receives its copy.¹⁷
3. Complaint. ASBCA Rule 6(a).
- a. The appellant must file a complaint within 30 days of the date it receives the docketing notice. But cf. Northrop Grumman Corp., DOT BCA No. 4041, 99-1 BCA ¶ 30,191 (requiring the government to file the complaint on a government claim).
 - b. The board does not require a particular format; however, the complaint should set forth:
 - (1) Simple, concise, and direct statements of the appellant's claims;
 - (2) The basis of each claim; and
 - (3) The amount of each claim, if known.
 - c. If sufficiently detailed, the board may treat the NOA as the complaint.
4. Answer. ASBCA Rule 6(b).
- a. The government must answer the complaint within 30 days of the date it receives the complaint.

¹⁷ As a practical matter, the ASBCA generally allows either party to supplement the R4 file up to the date of the hearing.

- b. The answer should set forth simple, concise, and direct statements of the government's defenses to each of the appellant's claims, including any affirmative defenses.
 - c. The board will enter a general denial on the government's behalf if the government fails to file its answer in a timely manner.
- 5. Discovery. ASBCA Rules 14-15.
 - a. The parties may begin discovery as soon as the appellant files the complaint.
 - b. The board encourages the parties to engage in voluntary discovery.
 - c. Discovery may include depositions, interrogatories, requests for the production of documents, and requests for admission.
- 6. Pre-Hearing Conferences. ASBCA Rule 10. The board may hold telephonic pre-hearing conferences to discuss matters that will facilitate the processing and disposition of the appeal.
- 7. Motions. ASBCA Rule 5.
 - a. Parties must file jurisdictional motions promptly; however, the board may defer its ruling until the hearing.
 - b. Parties may also file appropriate non-jurisdictional motions.
- 8. Record Submissions. ASBCA Rule 11.
 - a. Either party may waive its right to a hearing and submit its case on the written record.
 - b. The parties may supplement the record with affidavits, depositions, admissions, and stipulations when they choose to submit their case on the written record. See Solar Foam Insulation, ASBCA No. 46921, 94-2 BCA ¶ 26,901.

9. Hearings. ASBCA Rules 17-25.
 - a. The board will schedule the hearing and choose the location.
 - b. Hearings are relatively informal; however, the board generally adheres to the Federal Rules of Evidence.
 - c. Both parties may offer evidence in the form of testimony and exhibits.
 - d. Witnesses generally testify under oath and are subject to cross-examination.
 - e. The board may subpoena witnesses and documents.
 - f. A court reporter will prepare a verbatim transcript of the proceedings.
10. Briefs. ASBCA Rule 23. The parties may file post-hearing briefs after they receive the transcript and/or the record is closed.
11. Decisions. ASBCA Rule 28.
 - a. The ASBCA issues written decisions.
 - b. The presiding judge normally drafts the decision; however, three judges decide the case.
12. Motions for Reconsideration. ASBCA Rule 29.
 - a. Either party may file a motion for reconsideration within 30 days of the date it receives the board's decision.
 - b. Motions filed after 30 days are untimely. Bio-temp Scientific, Inc., ASBCA No. 41388, 95-2 BCA ¶ 86,242; Arctic Corner, Inc., ASBCA No. 33347, 92-2 BCA ¶ 24,874.

- c. Absent unusual circumstances, a party may not use a motion for reconsideration to correct errors in its initial presentation. Metric Constructors, Inc., ASBCA No. 46279, 94-2 BCA ¶ 26,827.

- 13. Appeals. 41 U.S.C. § 607(g)(1). Either party may appeal to the Court of Appeals for the Federal Circuit (CAFC) within 120 days of the date it receives the board's decision; however, the government needs the consent of the U.S. Attorney General. 41 U.S.C. § 607(g)(1)(B).

G. Accelerated Appeals. 41 U.S.C. § 607(f); ASBCA Rule 12.3.

- 1. If the amount in dispute is \$100,000 or less, the contractor may choose to proceed under the board's accelerated procedures.
- 2. The board renders its decision, whenever possible, within 180 days from the date it receives the contractor's election; therefore, the board encourages the parties to limit (or waive) pleadings, discovery, and briefs.
- 3. The presiding judge normally issues the decision with the concurrence of a vice chairman. If these two individuals disagree, the chairman will cast the deciding vote.
 - a. Written decisions normally contain only summary findings of fact and conclusions.
 - b. If the parties agree, the presiding judge may issue an oral decision at the hearing and follow-up with a memorandum to formalize the decision.
- 4. Either party may appeal to the CAFC within 120 days of the date it receives the decision.

H. Expedited Appeals. 41 U.S.C. § 608; ASBCA Rule 12.2.

- 1. If the amount in dispute is \$50,000 or less, the contractor may choose to proceed under the board's expedited procedures.

2. The board renders its decision, whenever possible, within 120 days from the date it receives the contractor's election; therefore, the board uses very streamlined procedures (e.g., accelerated pleadings, extremely limited discovery, etc.).
3. The presiding judge decides the appeal.
 - a. Written decisions contain only summary finds of fact and conclusions.
 - b. The presiding judge may issue an oral decision from the bench and follow-up with a memorandum to formalize the decision.
4. Neither party may appeal the decision, and the decision has no precedential value. See Palmer v. Barram, 184 F.3d 1373 (Fed. Cir. 1999) (holding that a small claims decision is only appealable for fraud in the proceedings).

I. Remedies.

1. The board may grant any relief available to a litigant asserting a contract claim in the COFC. 41 U.S.C. § 607(d).
 - a. Money damages is the principal remedy sought.
 - b. The board may issue a declaratory judgment. See Malone v. United States, 849 F.2d 1441 (Fed. Cir. 1988) (validity of T4D).

c. The board may award attorney's fees pursuant to the Equal Access to Justice Act (EAJA). 5 U.S.C. § 504. See Hughes Moving & Storage, Inc., ASBCA No. 45346, 00-1 BCA ¶ 30,776 (award decision in T4D case); Oneida Constr., Inc., ASBCA No. 44194, 95-2 BCA ¶ 27,893 (holding that the contractor's rejection of the agency settlement offer, which was more than the amount the board subsequently awarded, did not preclude recovery under the EAJA); cf. Cape Tool & Die, Inc., ASBCA No. 46433, 95-1 BCA ¶ 27,465 (finding rates in excess of the \$75 per hour guideline rate reasonable for attorneys in the Washington D.C. area with government contracts expertise). Q.R. Sys. North, Inc., ASBCA No. 39618, 96-1 BCA ¶ 27,943 (rejecting the contractor's attempt to transfer corporate assets so as to fall within the EAJA ceiling).

2. The board need not find a remedy-granting clause to grant relief. See S&W Tire Serv., Inc., GSBCA No. 6376, 82-2 BCA ¶ 16,048 (awarding anticipatory profits).
3. The board may not grant specific performance or injunctive relief. General Elec. Automated Sys. Div., ASBCA No. 36214, 89-1 BCA ¶ 21,195. See Western Aviation Maint., Inc. v. General Services Admin., GSBCA No. 14165, 98-2 BCA ¶ 29,816 (holding that the 1992 Tucker Act amendments did not waive the government's immunity from specific performance suits).

J. Payment of Judgments. 41 U.S.C. § 612.

1. An agency may access the "Judgment Fund" to pay "[a]ny judgment against the United States on a [CDA] claim." 41 U.S.C. § 612(a). See 31 U.S.C. § 1304; cf. 28 U.S.C. § 2517.
 - a. The Judgment Fund is only available to pay judgments and monetary awards—it is not available to pay informal settlement agreements. See 41 U.S.C. § 612(a)(b); see also 31 U.S.C. § 1304.

- b. If an agency lacks sufficient funds to cover an informal settlement agreement, it can “consent” to the entry of a judgment against it. See Bath Irons Works Corp. v. United States, 20 F.3d 1567, 1583 (Fed. Cir. 1994); Casson Constr. Co., GSBCA No. 7276, 84-1 BCA ¶ 17,010 (1983). As a matter of policy, however, it behooves the buying activity to coordinate with its higher headquarters regarding the use of consent decrees since the agency must reimburse the Judgment Fund with current funds.
 - 2. Prior to payment, both parties must certify that the judgment is “final” (i.e., that the parties will pursue no further review). 31 U.S.C. § 1304(a). See Inland Servs. Corp., B-199470, 60 Comp. Gen. 573 (1981).
 - 3. An agency must repay the Judgment Fund from appropriations current at the time of the award or judgment. 41 U.S.C. § 612(c). Bureau of Land Management, B-211229, 63 Comp. Gen. 308 (1984).
- K. Appealing an Adverse Decision. 41 U.S.C. § 607(g)(1). Board decisions are final unless one of the parties appeals to the CAFC within 120 days after the date the party receives the board’s decision. See Placeway Constr. Corp. v. United States, 713 F.2d 726 (Fed. Cir. 1983).

VIII. ACTIONS BEFORE THE COURT OF FEDERAL CLAIMS (COFC).

- A. The right to file suit. Subsequent to receipt of a contracting officer’s final decision, a contractor may bring an action directly on the claim in the COFC. 41 U.S.C. § 609(a)(1).
- B. The Court of Federal Claims (COFC).
 - 1. Over a third of the court’s workload concerns contract claims.
 - 2. The President appoints COFC judges for a 15-year term with the advice and consent of the Senate.
 - 3. The President can reappoint a judge after the initial 15-year term expires.

4. The Federal Circuit can remove a judge for incompetency, misconduct, neglect of duty, engaging in the practice of law, or physical or mental disability.
5. The Rules of the United States Court of Federal Claims (RCFC) appear in an appendix to Title 28 of the United States Code.

C. Jurisdiction.

1. The Tucker Act. 28 U.S.C. § 1491(a)(1). The COFC has jurisdiction to decide claims against the United States based on:
 - a. The Constitution;
 - b. An act of Congress;
 - c. An executive regulation; or
 - d. An express or implied-in-fact contract.
2. The Contract Disputes Act (CDA) of 1978. 41 U.S.C. § 609. The Court has jurisdiction to decide appeals from contracting officers' final decisions.
3. The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (codified at 28 U.S.C. § 1491(a)(2)). The COFC has jurisdiction to decide nonmonetary claims (e.g., disputes regarding contract terminations, rights in tangible or intangible property, and compliance with cost accounting standards) that arise under section 10(a)(1) of the CDA.

- D. Standard of Review. 41 U.S.C. § 609(a)(3). The COFC will review the case de novo. The COFC will not presume that the contracting officer's findings of fact and conclusions of law are valid. Instead, the COFC will treat the contracting officer's final decision as one more piece of documentary evidence and weigh it with all of the other evidence in the record. Wilner v. United States, 24 F.3d 1397 (Fed. Cir. 1994) (en banc) (overruling previous case law that a contracting officer's final decision constitutes a "strong presumption or an evidentiary admission" of the government's liability).

E. Perfecting an Appeal.

1. Timeliness. 41 U.S.C. § 609(a); RCFCs 3 and 6.

- a. A contractor must file its complaint within 12 months of the date it received the contracting officer's final decision. See Janicki Logging Co. v. United States, 124 F.3d 226 (Fed. Cir. 1997) (unpub.); K&S Constr. v. United States, 35 Fed. Cl. 270 (1996); see also White Buffalo Constr., Inc. v. United States, 28 Fed. Cl. 145 (1992) (filing one day after the expiration of the 12 month period rendered it untimely).
- b. In computing the appeals period, exclude:
 - (1) The day the contractor received the contracting officer's decision; and
 - (2) The last day of the appeals period if that day is:
 - (a) A Saturday, Sunday, or federal holiday; or
 - (b) A day on which weather or other conditions made the Clerk of Court's office inaccessible.
- c. The COFC may deem a late complaint timely if:
 - (1) The plaintiff sent the properly addressed complaint by registered or certified mail, return receipt requested;
 - (2) The plaintiff deposited the complaint in the mail sufficiently in advance of the due date to permit its timely receipt in the ordinary course of the mail; and
 - (3) The plaintiff exercised no control over the complaint from the time of mailing to the time of delivery.

See B. D. Click Co. v. United States, 1 Cl. Ct. 239 (1982) (concluding that the contractor failed to demonstrate the applicability of the exception to the timeliness rules).

- d. The Fulford Doctrine. See para. VI.F.3, above.
- 2. Filing Method. RCFC 3. The contractor must deliver its complaint to the Clerk of Court.
- 3. Contents. RCFC 8(a); RCFC 9(h).
 - a. If the complaint sets forth a claim for relief, the complaint must contain:
 - (1) A “short and plain” statement regarding the COFC’s jurisdiction;
 - (2) A “short and plain” statement showing that the plaintiff is entitled to relief; and
 - (3) A demand for a judgment.
 - b. In addition, the complaint must contain, inter alia:
 - (1) A statement regarding any action taken on the claim by Congress, a department or agency of the United States, or another tribunal;
 - (2) A clear citation to any statute, regulation, or executive order upon which the claim is founded; and
 - (3) A description of any contract upon which the claim is founded.
- 4. The Election Doctrine. See para. II.B.3, above.

F. Procedures.

1. Process. RCFC 4. The Clerk of Court serves 5 copies of the complaint on the Attorney General (or the Attorney General's designated agent).
2. "Call Letter." 28 U.S.C. § 520.
 - a. The Attorney General must send a copy of the complaint to the responsible military department.
 - b. In response, the responsible military department must provide the Attorney General with a "written statement of all facts, information, and proofs."
3. Answer. RCFCs 8, 12, and 13. The government must answer the complaint within 60 days of the date it receives the complaint.
4. The court rules regulate discovery and pretrial procedures extensively, and the court may impose monetary sanctions for noncompliance with its discovery orders. See M. A. Mortenson Co. v. United States, 996 F.2d 1177 (Fed. Cir. 1993).
5. Decisions may result from either a motion or a trial. Procedures generally mirror those of trials without juries before federal district courts. The judges make written findings of fact and state conclusions of law.

G. Remedies.

1. The COFC has jurisdiction "to afford complete relief on any contract claim brought before the contract is awarded including declaratory judgments, and such equitable and extraordinary relief as it deems proper." Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, 96 Stat. 40 (codified at 28 U.S.C. § 1491(a)(3)). See Sharman Co., Inc. v. United States, 2 F.3d 1564 (Fed. Cir. 1993).

2. The COFC has no authority to issue injunctive relief or specific performance, except for reformation in aid of a monetary judgment, or rescission instead of monetary damages. See John C. Grimberg Co. v. United States, 702 F.2d 1362 (Fed. Cir. 1983); Rig Masters, Inc. v. United States, 42 Fed. Cl. 369 (1998); Paragon Energy Corp. v. United States, 645 F.2d 966 (Ct. Cl. 1981).

3. The COFC may award EAJA attorneys' fees. 28 U.S.C. § 2412.

H. Payment of Judgments. See para. VII.J., above.

I. Appealing an Adverse Decision.

1. Unless timely appealed, a final judgment bars any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy. 28 U.S.C. § 2519.

2. A party must appeal a final judgment to the CAFC within 60 days of the date the party receives the adverse decision. 28 U.S.C. § 2522. See RCFC 72.

IX. APPEALS TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT (CAFC).

A. National Jurisdiction.

1. The Federal Circuit has national jurisdiction. Dewey Elec. Corp. v. United States, 803 F.2d 650 (Fed. Cir. 1986); Teller Envtl. Sys., Inc. v. United States, 802 F.2d 1385 (Fed. Cir. 1986).

2. The Federal Circuit also exclusive jurisdiction over appeals from an agency BCA and the COFC pursuant to section 8(g)(1) of the CDA. 28 U.S.C. § 1295(a)(3) and (10).

B. Standard of Review. 41 U.S.C. § 609(b).

1. Jurisdiction. The court views jurisdictional challenges as “pure issues of law,” which it reviews de novo. See Transamerica Ins. Corp. v. United States, 973 F.2d 1572, 1576 (Fed. Cir. 1992).
 2. Findings of Fact. Findings of fact are final and conclusive unless they are fraudulent, arbitrary, capricious, made in bad faith, or not supported by substantial evidence. 49 U.S.C. § 609(b). See United States v. General Elec. Corp., 727 F.2d 1567, 1572 (Fed. Cir. 1984) (holding that the court will affirm a board’s decision if there is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion”); Tecom, Inc. v. United States, 732 F.2d 935, 938 n.4 (Fed. Cir. 1995) (finding that the trier of fact’s credibility determinations are virtually unreviewable).
- C. Frivolous Appeals. The court will assess damages against parties filing frivolous appeals. See Dungaree Realty, Inc. v. United States, 30 F.3d 122 (Fed. Cir. 1994); Wright v. United States, 728 F.2d 1459 (Fed. Cir. 1984).
- D. Supreme Court Review. The U.S. Supreme Court reviews decisions of the Federal Circuit by writ of certiorari.

X. CONTRACT ATTORNEY RESPONSIBILITIES IN THE DISPUTES PROCESS.

- A. Actions upon Receipt of a Claim.
1. Review the claim and check the agency’s facts and theories.
 2. Verify that the contractor has properly certified all claims exceeding \$100,000.
 3. Advise the contracting officer to consider business judgment factors, as well as legal issues.
- B. Contracting Officer’s Final Decision.
1. Prior to reviewing the final decision, determine whether the claim should be certified. If the claim exceeds \$100,000, ensure that a person authorized to bind the contractor properly certified the claim.

2. Ensure that the subject of the final decision is a nonroutine request for payment, rather than a contractor's invoice or preliminary request for adjustment.
3. Review the final decision for sufficiency of factual and legal reasoning.
4. Ensure that the decision letter properly sets forth the contractor's appeal rights.

C. R4 File.

1. Oversee the preparation of the Rule 4 file. If possible, coordinate with the trial counsel assigned to the appeal as to what documents to include/omit from the Rule 4 file.
2. Put privileged documents in a separate litigation file for transmission to the trial attorney.

D. Discovery.

1. Assist the trial attorney in formulating a discovery plan.
2. Identify knowledgeable government and contractor personnel and conduct preliminary interviews of government witnesses.
3. Draft interrogatories, requests for documents, requests for admissions, and other discovery requests. Prepare draft responses to any discovery requests propounded by the appellant.
4. Assist the trial counsel during depositions (e.g., by identifying key contractor personnel and pertinent documents related to the dispute). Coordinate with the trial counsel regarding the feasibility of conducting one or more depositions.

E. Hearings.

1. Through the trial attorney, coordinate with the Chief Trial Attorney concerning appearing as counsel of record.

2. To the extent practicable, assist in witness and evidence preparation.
 3. Assist in the preparation and/or review of post-hearing briefs.
- F. Client Expectations. Assist the trial attorney in providing the contracting officer and other interested parties regular status updates regarding the appeal.
- G. Settlement. Work with the contracting officer and the trial attorney regarding the costs and benefits of litigating the claim. Strive for a position that reflects sound business judgment and protects the interests of the government.

XI. CONCLUSION.

ATTACHMENT A

52.233-1 Disputes.

As prescribed in 33.215, insert the following clause:

Disputes (July 2002)

(a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 601-613).

(b) Except as provided in the Act, all disputes arising under or relating to this contract shall be resolved under this clause.

(c) "Claim," as used in this clause, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract. However, a written demand or written assertion by the Contractor seeking the payment of money exceeding \$100,000 is not a claim under the Act until certified. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim under the Act. The submission may be converted to a claim under the Act, by complying with the submission and certification requirements of this clause, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

(d)(1) A claim by the Contractor shall be made in writing and, unless otherwise stated in this contract, submitted within 6 years after accrual of the claim to the Contracting Officer for a written decision. A claim by the Government against the Contractor shall be subject to a written decision by the Contracting Officer.

(2)(i) The Contractor shall provide the certification specified in paragraph (d)(2)(iii) of this clause when submitting any claim exceeding \$100,000.

(ii) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(iii) The certification shall state as follows: "I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the Contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the Contractor."

(3) The certification may be executed by any person duly authorized to bind the Contractor with respect to the claim.

(e) For Contractor claims of \$100,000 or less, the Contracting Officer must, if requested in writing by the Contractor, render a decision within 60 days of the request. For Contractor-

certified claims over \$100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date by which the decision will be made.

(f) The Contracting Officer's decision shall be final unless the Contractor appeals or files a suit as provided in the Act.

(g) If the claim by the Contractor is submitted to the Contracting Officer or a claim by the Government is presented to the Contractor, the parties, by mutual consent, may agree to use alternative dispute resolution (ADR). If the Contractor refuses an offer for ADR, the Contractor shall inform the Contracting Officer, in writing, of the Contractor's specific reasons for rejecting the offer.

(h) The Government shall pay interest on the amount found due and unpaid from (1) the date that the Contracting Officer receives the claim (certified, if required); or (2) the date that payment otherwise would be due, if that date is later, until the date of payment. With regard to claims having defective certifications, as defined in FAR 33.201, interest shall be paid from the date that the Contracting Officer initially receives the claim. Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Act, which is applicable to the period during which the Contracting Officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim.

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

(End of clause)

Alternate I (Dec 1991). As prescribed in 33.215, substitute the following paragraph (i) for paragraph (i) of the basic clause:

(i) The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract, and comply with any decision of the Contracting Officer.

CHAPTER 25

ALTERNATIVE DISPUTE RESOLUTION

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ALTERNATIVE DISPUTE RESOLUTION

I. BACKGROUND.

- A. The Contract Disputes Act of 1978 (CDA) was one of the first forms of alternate dispute resolution (ADR) specifically devised for contract disputes. The CDA requires the Boards of Contract Appeals (BCA) to “provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes.” 41 U.S.C. § 607(e).
1. The CDA was designed to encourage the resolution of contract disputes by negotiation prior to the onset of formal litigation. S. Rep. No. 95-1118.
 2. The CDA favors negotiation between the contractor and the agency at the claim stage, before litigation begins. At this stage the agency is typically represented by the contracting officer, who makes the initial decision on a contractor’s claim. If the dispute cannot be resolved between the contractor and the contracting officer, the CDA requires the contracting officer to issue a final decision. The contractor can then appeal this final decision to either a Board of Contract Appeals or the Court of Federal Claims. 41 U.S.C. § 605; FAR 33.206 and 33.211.
 3. Following enactment of the CDA, it became clear that Congress’ goal of providing an inexpensive method for contractors to pursue appeals had not been realized. The court-like rules of practice and procedure followed by the Boards, combined with the complex nature of many contract claims, resulted in appeals as time-consuming as litigation in federal court.
- B. Administrative Disputes Resolution Act of 1990. (ADRA). By the end of the 1980s, Congress found that “administrative proceedings had become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes.” ADRA, Pub. L. No. 101-552, § 2(2), 104 Stat. 2738 (1990).

1. Congress decided that ADR, used successfully in the private sector, would work in the public sector and would “lead to more creative, efficient and sensible outcomes.” ADRA, Pub. L. No. 101-552, § 2(3) and (4), 104 Stat. 2738 (1990).
 2. The ADRA explicitly authorized federal agencies to use ADR to resolve administrative disputes, including contract disputes. ADRA, Pub. L. No. 101-552, § 4(a), 104 Stat. 2738 (1990).
 3. Under the ADRA, ADR was defined as any procedure used, in lieu of adjudication, to resolve issues in controversy, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, or any combination of these techniques. ADRA, Pub. L. No. 101-552, § 4(b), 104 Stat. 2738 (1990). The ADRA of 1990 expired by its own terms on 1 October 1995.
- C. On October 19, 1996, Congress enacted the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, 110 Stat 3870, amending 5 U.S.C. §§ 571-584 (see also Federal Acquisition Circular 97-09, 63 Fed. Reg. 58,586 (Final Rules) (1998), amending the FAR to implement the ADRA)). The Act:
1. permanently authorized the ADRA;
 2. redefined ADR as procedure used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, factfinding, minitrials, arbitration, and use of ombuds, or any combination of these techniques;
 3. eliminated the right of federal agencies to opt out of binding arbitration decisions with which they disagreed;
 4. exempted dispute resolution communications relative to ADR from disclosure under the Freedom of Information Act;
 5. created extensive confidentiality requirements for neutrals and parties making “dispute resolution communications” while participating in “dispute resolution proceedings.”

6. authorized an exception to full and open competition for the purpose of contracting with a “neutral person” for the resolution of any existing or anticipated litigation or dispute; and
7. required the President to designate an agency or establish an interagency committee to facilitate and encourage the use of ADR. By Presidential Memorandum dated 1 May 1998, the Interagency Alternative Dispute Resolution Working Group was established. See <http://www.adr.gov>.

D. Federal Acquisition Regulation. It is now the government’s express policy to attempt to resolve all contract disputes at the contracting officer level. Agencies are encouraged to use ADR procedures to the “maximum extent practicable.” FAR 33.204.

1. FAR 33.214(a) identifies four essential elements for the use of ADR techniques:

- a. existence of an issue in controversy;
- b. voluntary election by both parties to participate in the ADR process;
- c. agreement to ADR and terms to be used in lieu of formal litigation; and
- d. participation in the process by officials of both parties who have authority to resolve the issue in controversy.

2. If the contracting officer rejects a contractor's request for ADR, the contracting officer must provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or other specific reasons that ADR is inappropriate. FAR 33.214. Additionally, when a contractor rejects an agency ADR request, the contractor must inform the agency in writing of the contractor's specific reasons for rejecting the request. FAR 33.214.

E. DOD Policy and Implementation. Each DOD component shall use ADR techniques “whenever possible” and shall establish ADR policies and programs. DOD Dir. 5145.5.

1. Army. Pursuant to DOD Dir. 5145.5 and a Secretary of the Army issued policy memo, "Army personnel are urged to use ADR procedures in appropriate cases." Memorandum, Secretary of the Army, subject: Implementation of the ADRA of 1990 (July 25, 1995). The Army's ADR program is implemented through subordinate commands, for example Contract Appeals Division, Corps of Engineers, and Army Materiel Command. See ADR Policies and Procedures Guide, available at <http://www.jagcnet.army.mil/cad>. See Army ADR website *available at* <http://www.hqda.army.mil/ogc/referenc/adr.htm>.

2. Air Force. The Air Force institutionalized its use of ADR by issuance of a comprehensive policy on dispute resolution entitled "ADR First." The policy states that ADR will be the first-choice method of resolving contract disputes if traditional negotiations fail and it represents an affirmative determination to avoid the disruption and high cost of litigation. ADR: Air Force Launches New ADR Initiative; Drafts Legislation to Fund ADR Settlements, Fed. Cont. Daily (BNA) (Apr. 28, 1999); see also Air Force Policy Directive 51-12 (Jan. 9, 2003) and AFFARS 5333.090. See Air Force ADR website *available at* <http://www.adr.af.mil>.

3. Navy. The first Department of Navy ADR policy was issued in 1987, stating "every reasonable step must be taken to resolve disputes prior to litigation." Memorandum, Assistant Secretary of the Navy (Shipbuilding and Logistics), subject: Alternative Dispute Resolution (1987). The current Navy policy states ADR shall be used to the "maximum extent practicable" with the goal of resolving disputes at the earliest stage feasible, by the fastest and quickest means possible, and at the lowest possible organizational level. SECNAVINST 5800.13A (Dec. 22, 2005). See Navy ADR website *available at* <http://adr.navy.mil>.

II. DISPUTE RESOLUTION CONTINUUM.

- A. Range. Alternative dispute resolution techniques exist within a dispute resolution continuum, ranging from dispute avoidance to litigation. The purpose of any ADR method is to settle the dispute without resorting to costly and time-consuming litigation before the courts and boards.

B. Dispute Avoidance (Partnering).

1. A process by which the contracting parties form a relationship of teamwork, cooperation, and good faith performance. It is a long-term commitment between two or more parties for the purpose of achieving mutually beneficial goals.
2. Partnering fosters communication and agreement on common goals and methods of performance. Examples of common goals are:
 - a. the use of ADR and elimination of litigation;
 - b. timely project completion;
 - c. high quality work;
 - d. safe workplace;
 - e. cost control;
 - f. value engineering;
 - g. reasonable profit.
3. Partnering is NOT:
 - a. Mandatory. It is not a contractual requirement and does not give either party legal rights. The parties must voluntarily agree to the process, because it is a commitment to an on-going relationship.
 - b. A “Cure-All.” Reasonable differences will still occur, but one of the benefits of partnering is that it ensures the differences are honest and in good faith.
4. Implementing Partnering. Although voluntary, partnering is typically implemented through formal, specific methods that the parties agree upon.

- a. Requires commitment of top management officials of all parties.
- b. Parties need to establish clear lines of communication and responsibility, and agree to ADR methods for resolving legitimate disagreements.
- c. In the Air Force, for all acquisition categories (ACAT) I and II programs (i.e., major weapons systems), contracting officers “shall establish an agreement between the Government and the contractor that “outlines the intent of parties with respect to the use of ADR.” AFFARS 5333.214.
- d. For examples of corporate-level ADR agreements, see the Air Force ADR Reference Book, section 1.3.2 *available at* <http://www.adr.af.mil/acquisition/index.html>.

C. Unassisted Negotiations.

- 1. In traditional unassisted negotiation, the parties attempt to reach a settlement without involvement of outside parties.
- 2. Elements of Successful Negotiation:
 - a. Parties identify issues upon which they differ.
 - b. Parties disclose their respective needs and interests.
 - c. Parties identify possible settlement options.
 - d. Parties negotiate terms and conditions of agreement.
- 3. Goal: Each party should be in a better position than if they had not negotiated.

D. ADR Procedures. Defined broadly to include any procedure or combination of procedures that “may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitration, and use of ombudsmen,” ADR techniques rely upon participation by a third-party neutral. See ADRA of 1996, 5 U.S.C. §§ 571-584 and FAR 33.201. Typically ADR types fall within one of three general categories:

1. Process Assistance/Assisted Negotiations:

a. Mediation. Mediation is helpful when the parties are not making progress negotiating between themselves. Mediation is simply negotiation with the assistance of a third party neutral who is an expert in helping people negotiate but has no decision-making authority. See “Alternative Dispute Resolution – Edition III,” Briefing Papers No. 03-5, p. 1 (April 2003). See DONALD ARNAVAS, ALTERNATIVE DISPUTE RESOLUTION FOR GOVERNMENT CONTRACTS 7 (2004).

- (1) The mediator should be neutral, impartial, acceptable to both parties, and should not have any decision-making power.
- (2) A professional mediator will normally approach a dispute with a formal strategy, consisting of a method of analysis, an opening statement, recognized stages of mediation, such as ex parte caucuses, and a variety of mediation tools for breaking impasses and bringing about a resolution.
- (3) Mediators (as well as arbitrators and other neutrals) may be retained without full and open competition. FAR 6.302-3(a)(2)(iii) and (b)(3). Moreover, third-party neutral functions (like mediating and arbitrating) in ADR methods are not inherently governmental functions for which agencies may not contract. See FAR 7.503(c)(2).

(4) At the ASBCA, the process is known as the “settlement judge technique.” A flexible procedure that allows the parties to make case presentations to each other in the presence of an ASBCA judge, who then facilitates settlement negotiations. “Alternative Dispute Resolution at the ASBCA,” Briefing Papers No. 00-7, p. 7 (June 2000). See, ASBCA Notice Regarding Alternative Methods of Dispute Resolution *available at* <http://docs.law.gwu.edu/asbca>.

b. Mini-Trials. The term “mini-trial” is a misnomer, as it is NOT a shortened judicial proceeding. In a mini-trial, the parties present either their whole case, or specific issues, to a panel in an abbreviated hearing. An advantage of the mini-trial is it forces the parties to focus on a dispute and settle it early. See, ASBCA Notice Regarding Alternative Methods of Dispute Resolution *available at* <http://docs.law.gwu.edu/asbca>. See DONALD ARNAVAS, ALTERNATIVE DISPUTE RESOLUTION FOR GOVERNMENT CONTRACTS 7 and 127 (2004).

(1) Mini-trials have been used by the Army Corps of Engineers in several cases. The first was the Tennessee Tombigbee Construction, Inc. case in 1985. In that case, Professor Ralph Nash served as the neutral advisor, and a \$17.25 million settlement was worked out between the government and the contractor. See 44 Federal Contracts Reporter (BNA) 502 (1985).

(2) Participants in a mini-trial include the principals, the parties’ attorneys, and witnesses. The principals may choose to employ a neutral advisor.

(3) In a mini-trial, the attorneys engage in a brief discovery process and then present their case to a specially-constituted panel. The panel consists of party principals and the neutral advisor if desired.

- (a) Each party selects a principal to represent it on the panel. The principal should have sufficient authority permitting unilateral decisions regarding the dispute and should not have been personally or closely involved in the dispute.
 - (b) The parties should jointly select the neutral advisor, and share expenses. The neutral advisor should possess negotiation and legal skills, and if the issues are highly technical, a technical expert is desirable.
 - (c) The neutral advisor may perform a number of functions, including answering questions from the principals, questioning witnesses and counsel to clarify facts and legal theories, acting as a mediator and facilitator during negotiations, and generally presiding over the mini-trial to keep the parties on schedule.
- (4) After hearing the case, the principals try to negotiate a settlement. If an impasse, the neutral advisor may try to mediate a solution. If the advisor is an ASBCA judge, they may discuss the likely outcome if the case were to go to court or the board.

2. Outcome Prediction.

- a. Non-Binding Arbitration. This form of arbitration aids the parties in making their own settlement. It is best used when senior managers do not have time to sit through a mini-trial and when disputes are highly technical. See DONALD ARNAVAS, ALTERNATIVE DISPUTE RESOLUTION FOR GOVERNMENT CONTRACTS 23 and 127 (2004).
 - (1) Normally an informal presentation of the case, done by counsel with client input.
 - (2) Evidence is presented by document, deposition, and affidavit.

- (3) Few live witnesses.
- (4) The arbitrator's decision or opinion, sometimes called an award, serves to further settlement discussions. The parties get an idea of how the case may be decided by a court or board.
- (5) The arbitrator may also evolve into the role of a mediator after a decision is issued.

b. For bid protests at GAO, parties frequently utilize an "outcome prediction" conference, in which a GAO staff attorney advises the parties as to the perceived merits of the protest in light of the case facts and prior GAO decisions. See Tyecom, Inc. B-287321.3; B-287321.4, April 29, 2002. See also Bid Protests at GAO: A Descriptive Guide *available at* <http://www.gao.gov/decisions/bidpro/bidpro.htm>. See DONALD ARNAVAS, ALTERNATIVE DISPUTE RESOLUTION FOR GOVERNMENT CONTRACTS 127 (2004).

3. Adjudication.

a. Private Binding Arbitration. Binding arbitration is the ADR technique that most closely resembles traditional, formal litigation. "Alternative Dispute Resolution – Edition III," Briefing Papers No. 03-5, p. 2 (April 2003). This form of arbitration results in an award, enforceable in courts.

- (1) Normally a formal presentation of the case, much like a trial, though strict rules of evidence may not be followed.
- (2) Evidence is presented by document, deposition, affidavit, and live witnesses, with full cross-examination.
- (3) Arbitration panels consist of one to three arbitrators, who serve to control the proceeding, but do not take an active role in the case presentation.

- (4) Private conversations between the parties and the arbitrators are forbidden. This is much different than mediation, during which private conversations between a party and the mediator are not uncommon.
 - (5) The arbitrator has full responsibility for rendering justice under the facts and law.
 - (6) The arbitrator's award is binding, so the arbitrator must be more careful about controlling the parties' case presentation and the reliability of the evidence presented.
- b. Summary Trial with Binding Decision. In practice before the ASBCA, a summary trial results in a binding decision. The parties try the case informally before a board judge on an expedited, abbreviated basis. "Alternative Dispute Resolution at the ASBCA," Briefing Papers No. 00-7, p. 5 (June 2000). DOD personnel are not generally authorized to use a binding ADR method that does not involve the ASBCA. See ADR Policies and Procedures Guide, *available at* <http://www.jagcnet.army.mil/cad>. See, ASBCA Notice Regarding Alternative Methods of Dispute Resolution *available at* <http://docs.law.gwu.edu/asbca>. See also the Air Force ADR Reference Book, section 4.3.2 *available at* <http://www.adr.af.mil/acquisition/index.html>. See DONALD ARNAVAS, ALTERNATIVE DISPUTE RESOLUTION FOR GOVERNMENT CONTRACTS 127 (2004).

III. TIME PERIODS FOR USING ADR.

A. Before Protest or Appeal.

- 1. Protests. The FAR has long provided authority for agencies to hear protests. FAR 33.103 implements Executive Order 12979 and requires agencies to:
 - a. Emphasize that the parties shall use their best efforts to resolve the matter with the contracting officer prior to filing a protest (FAR 33.103(b));

- b. Provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, using ADR techniques where appropriate (FAR 33.103(c));
 - c. Allow for review of the protest at “a level above the contracting officer” either initially or as an internal appeal (FAR 33.103(d)(4)) and,
 - d. Withhold award or suspend performance if the protest is received within 10 days of award or 5 days after debriefing. FAR 33.103(f)(1)-(3). But an agency protest will not extend the period within which to obtain a stay at GAO, although the agency may voluntarily stay performance. FAR 33.103(f)(4).
2. Appeals. The ADRA provides clear and unambiguous government authority for contracting officers to voluntarily use any form of ADR during the period before an appeal is filed. 5 U.S.C. § 572(a); FAR 33.214(c).

B. After Protest or Appeal.

1. The GAO Bid Protest Regulations now provide that GAO, on its own or upon request, may use flexible alternative procedures to resolve a protest, including ADR procedures. 5 C.F.R. 21.10. See also Bid Protests at GAO: A Descriptive Guide *available at* <http://www.gao.gov/decisions/bidpro/bidpro.htm>. As noted earlier, parties frequently utilize an “outcome prediction” conference. See Tyecom, Inc. B-287321.3; B-287321.4, April 29, 2002.

2. With respect to contractor claims, once an appeal is filed, jurisdiction passes to the BCA. When an appeal is filed, the Board gives notice suggesting the parties pursue the possibility of using ADR, including mediation, mini-trials, and summary hearings with binding decisions. The ASBCA has made aggressive use of ADR services in contract appeals disputes. See, ASBCA Notice Regarding Alternative Methods of Dispute Resolution *available at* <http://docs.law.gwu.edu/asbca>. See also “Alternative Dispute Resolution at the ASBCA,” Briefing Papers No. 00-7 (June 2000).

3. Parties who file appeals with the Court of Federal Claims (COFC) will also be informed of voluntary ADR methods available through the court. In 2001 COFC began an ADR pilot program, in which some cases are assigned simultaneously to an ADR judge. See Notice of ADR Pilot Program, at <http://www.contracts.ogc.doc.gov/fedcl/docs/adr.html>. The goal of the pilot program is to determine whether early neutral evaluation by a settlement judge will help parties understand their differences and their prospects for settlement.

IV. APPROPRIATENESS OF ADR.

A. When is it appropriate to use ADR? Agencies “may use a dispute resolution proceeding for the resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding.” 5 U.S.C. § 572(a). Also, government attorneys are to “make reasonable attempts to resolve a dispute expeditiously and properly before proceeding to trial.” Exec. Order No. 12988, § 1(c). Generally, ADR is appropriate for a case when:

1. Unassisted negotiations have failed to resolve the dispute and have reached an impasse;
2. Neither party is looking for binding precedent;
3. The parties wish to preserve a continuing relationship;
4. Confidentiality is important to either or both sides.

B. When is it inappropriate to use ADR? An agency should consider against using ADR when:

1. A definitive or authoritative resolution of the matter is required for precedential value, and an ADR proceeding is not likely to be accepted generally as an authoritative precedent. 5 U.S.C. § 572(b)(1);
2. The matter involves or may bear upon significant questions of Government policy that require additional procedures before a final resolution may be made, and an ADR proceeding would not likely serve to develop a recommended policy for the agency. 5 U.S.C. § 572(b)(2);

3. Maintaining established policies is of special importance, so that variations among individual decisions are not increased and an ADR proceeding would not likely reach consistent results among individual decisions. 5 U.S.C. § 572(b)(3);
4. The matter significantly affects persons or organizations who are not parties to the proceeding. 5 U.S.C. § 572(b)(4);
5. A full public record of the proceeding is important, and an ADR proceeding cannot provide such a record. 5 U.S.C. § 572(b)(5); or,
6. The agency must maintain continuing jurisdiction over the matter with authority to alter the disposition of the matter in light of changed circumstance, and an ADR proceeding would interfere with the agency's ability to fulfill that requirement. 5 U.S.C. § 572(b)(6).

V. STATUTORY REQUIREMENTS AND LIMITATIONS.

- A. Voluntariness. ADR methods authorized by the ADRA are voluntary, and supplement rather than limit other available agency dispute resolution techniques. 5 U.S.C. § 572(c).
- B. Limitations Applicable to Using Arbitration.
 1. Arbitration may be used by the consent of the parties either before or after a controversy arises. The arbitration agreement shall be:
 - a. in writing,
 - b. submitted to the arbitrator,
 - c. specify a maximum award and any other conditions limiting the possible outcomes. 5 U.S.C. § 575(c)(1) and (2).
 2. The Government representative agreeing to arbitration must have express authority to bind the Government. 5 U.S.C. § 575(b).

3. Before using binding arbitration, the agency head, after consulting with the Attorney General, must issue guidance on the appropriate use of binding arbitration. 5 U.S.C. § 575(c); see also DFARS Case 97-D304.
4. An agency may not require any person to consent to arbitration as a condition of entering into a contract or obtaining a benefit. 5 U.S.C. § 575(a)(3).
5. If a contractor rejects an agency request to use ADR, the contractor must notify the agency in writing of the reasons. FAR 33.214(b).
6. Once the parties reach a written arbitration agreement, however, the agreement is enforceable in Federal District Court. 5 U.S.C. § 576; 9 U.S.C. § 4.
7. An arbitration award does not become final until 30 days after it is served on all parties. The agency may extend this 30-day period for another 30 days by serving notice on all other parties. 5 U.S.C. § 580(b)(2).
8. A final award is binding on the parties, including the United States, and an action to enforce an award cannot be dismissed on sovereign immunity grounds. 5 U.S.C. § 580(c).
 - a. This provision, enacted as part of the 1996 ADRA, put to rest for the time being a long-standing dispute as to whether an agency can submit to binding arbitration.
 - b. DOJ's Historical Policy. The Justice Department had long opined that the Appointments Clause of Article II provides the exclusive means by which the United States may appoint its officers. DOJ's opinion was that only officers could bind the United States to an action or payment. Because arbitrators are virtually never appointed as officers under the Appointments clause, the government was not allowed to participate in binding arbitration.
 - c. DOJ's Present Position. However, DOJ has now opined that there is no constitutional bar against the government participating in binding arbitration if:

- (1) the arbitration agreement preserves Article III review of constitutional issues; and
 - (2) the agreement permits Article III review of arbitrators' determinations for fraud, misconduct, or misrepresentation. DOJ also points out that the arbitration agreement should describe the scope and nature of the remedy that may be imposed and that care should be taken to ensure that statutory authority exists to effect the potential remedy.
 - d. Judicial Interpretation. The Court of Federal Claims has found DOJ's memorandum persuasive and agreed that no constitutional impediment precludes an agency from submitting to binding arbitration. Tenaska Washington Partners II v. United States, 34 Fed. Cl. 434 (1995).
- C. Judicial Review Prohibited. Generally, an agency's decision to use or not use ADR is within the agency's discretion, and shall not be subject to judicial review. 5 U.S.C. § 581(b)(1).
1. However, arbitration awards are subject to judicial review under 9 U.S.C. § 10(b).
 2. Section 10(b) authorizes district courts to vacate an arbitration award upon application of any party where the arbitrator was either partial, corrupt, or both.

VI. CONCLUSION.

CHAPTER 26

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CHAPTER 26

INTRAGOVERNMENTAL ACQUISITIONS AND REQUIRED SOURCES

I. INTRODUCTION. Following this block of instruction, students will understand:

- A. The various statutory authorities that permit federal agencies to purchase goods and services from each other.
- B. The obligation requirements associated with various intragovernmental acquisitions.
- C. The authority for intragovernmental employee training.
- D. The required sources for certain government acquisitions.

II. ECONOMY ACT.

- A. General. The Economy Act provides authority for federal agencies to order goods and services from other federal agencies, and to pay the actual costs of those goods and services. Congress passed the Act in 1932 to obtain economies of scale and eliminate overlapping activities of the federal government.
- B. Statutory Provisions. 31 U.S.C. § 1535.
 - 1. The Act permits the head of an agency to place an order for goods or services with another agency, or with a major organizational unit within the same agency, if
 - a. Funds are available;
 - b. The head of the agency decides the order is in the best interests of the government;

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- c. The agency or unit filling the order can provide or get by contract the goods or services; and
- d. The head of the agency decides that the ordered goods or services cannot be provided as conveniently or cheaply by a commercial enterprise. 31 U.S.C. §1535(a). See USA Info. Sys., Inc., and Dataware Techs., Inc. v. Government Printing Office, GSBCA Nos. 13535-P, 13560-P, 96-2 BCA ¶ 28,315; Dictaphone Corp., B-244691.2, Nov. 25, 1992, 92-2 CPD ¶ 380.

2. Applicability.

- a. Economy Act acquisitions include orders placed between military departments. See FAR 2.101 (defining executive agencies to include military departments); DFAS-IN Reg. 37-1, para. 120701; AFI 65-601, vol. I, para. 7.23; Valenzuela Eng'g, Inc., B-277979, Jan 26, 1998, 98-1 CPD ¶ 51; Obligation of Funds under Military Interdepartmental Purchase Requests, B-196404, 59 Comp. Gen. 563 (1980).
- b. The Economy Act applies only in the absence of a more specific interagency acquisition authority. FAR 17.500(b); An Interagency Agreement--Admin. Office of the U.S. Courts, B-186535, 55 Comp. Gen. 1497 (1976).
- c. The Economy Act does not apply to orders using the Developmental Fund for Iraq.

3. Actual Costs.

- a. The ordering agency must pay the performing agency the actual costs of the goods or services provided. See 31 U.S.C. § 1535(b); Use of Agencies' Appropriations to Purchase Computer Hardware for Dep't of Labor's Executive Computer Network, B-238024, 70 Comp. Gen. 592 (1991). Cf. DOD 7000.14-R (DOD Financial Management Regulation), Vol. 11A, Chap. 4; AFI 65-601, vol. I, paras. 7.17, 7.23.

- b. Actual costs include:
- (1) All direct costs attributable to providing the goods or services, regardless of whether the performing agency's expenditures are increased. Washington Nat'l Airport; Fed. Aviation Admin., B-136318, 57 Comp. Gen. 674 (1978). See GSA Recovery of SLUC Costs for Storage of IRS Records, B-211953, Dec. 7, 1984 (unpub.) (standard storage costs); David P. Holmes, B-250377, Jan. 28, 1993 (unpub.) (standard inventory, transportation, and labor costs); Economy Act Payments After Obligated Account Is Closed, B-260993, June 26, 1996, 96-1 CPD ¶ 287 (ordering activity required to use current funds to pay ten-year old obligation).
 - (2) Indirect costs, to the extent they are funded out of currently available appropriations, bear a significant relationship to providing the goods or services, and benefit the ordering agency. See Washington Nat'l Airport, supra (depreciation and interest); Obligation of Funds Under Mil. Interdep'tal Purchase Requests, B-196404, 59 Comp. Gen. 563 (1980) (supervisory and administrative expenses).
- c. DOD activities not funded by working capital funds normally do not charge indirect costs to other DOD activities. DOD 7000.14-R, Vol. 11A, para. 030601. Similarly, such activities generally do not charge indirect costs under interservice and intragovernmental support agreements. See DOD Instruction 4000.19, Interservice and Intragovernmental Support, para. D.6 (Aug. 9, 1995) (hereinafter DODI 4000.19).
- d. When "contracting out" for goods or services, the servicing agency may not require payment of a fee or charge which exceeds the actual cost of entering into and administering the contract. FAR 17.505(d); DOD 7000.14-R, Vol. 11A, para. 030601.

4. Obligation of Funds.

- a. The ordering agency obligates funds current when the performing activity accepts the reimbursable order and records the obligation upon receipt of written acceptance. 31 U.S.C. §§ 1501(a)(1), 1535(d); DFARS 208.7004-2(c); DOD 7000.14-R, Vol. 11A, para. 030404; DFAS-IN Reg. 37-1, table 8-2.
- b. If the performing activity has not incurred obligations to fill an order before the end of the period of fund availability, then the ordering activity must deobligate (recover) the funds. 31 U.S.C. § 1535(d); DOD 7000.14-R, Vol. 11A, para. 030404; The Honorable William F. Ford, B-223833, Nov. 5, 1987 (unpub.).

5. Compliance with CICA. The ordering agency may not procure from a performing agency that fails to comply with the Competition in Contracting Act (CICA) when contracting for a requirement. 10 U.S.C. § 2304(f)(5)(B); 41 U.S.C. § 253(f)(5)(B); Valenzuela Eng'g, Inc., B-277979, Jan 26, 1998, 98-1 CPD ¶ 51.

C. FAR Requirements. FAR Subpart 17.5; Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 1074, 108 Stat. 3243, 3271.

1. Determination & Finding (D&F) Requirement.

- a. Interagency Economy Act orders must be supported by a D&F stating that:
 - (1) Use of an interagency acquisition is in the best interest of the government; and
 - (2) The supplies or services cannot be obtained as conveniently or economically by contracting directly with a private source. FAR 17.503(a).

- b. Economy Act orders requiring contract action (to include placing an order against an existing IDIQ contract) by the performing agency also must include a statement on the D&F that:
 - (1) The acquisition will appropriately be made under an existing contract of the performing agency, entered into before placement of the order, to meet the requirements of the performing agency for the same or similar supplies or services;
 - (2) The performing agency has the capability/expertise to contract for the supplies or services, which capability is not available within the requesting agency; or
 - (3) The performing agency is specifically authorized by law or regulation to purchase such supplies or services on behalf of other agencies. FAR 17.503(b).
- c. **Do DOD Intra-Agency Economy Act orders (e.g., Army order off Air Force IDIQ supply contract or Navy requesting Army to contract for services) require a FAR Part 17.503 D&F?**
 - (1) **Issue is currently in flux and differs between services. Because intragovernmental acquisitions are currently a very high profile issue, check with your service's current policies. When in doubt, document with D&F.**
 - (2) **Army.**
 - (a) **Old Policy: A 1996 Policy Memo stated that, a D&F is not required for intra-DoD Economy Act orders. Memorandum for Acquisition Community, Subject: Contract Offloading Clarification, Kenneth Oscar, DASA, Procurement, 18 March 1996.**

- (b) **Current Policy¹: The 1996 policy memo is not reflected in the DFARS (217.503) or the AFARS. Current policy guidance out of the Office of the Deputy Assistant Secretary of the Army, Procurement Policy (POC Barbara Binney) is that unless an intraservice support agreement (DD Form 1144) is in place pursuant to DOD Instruction 4000.19, Interservice and Intragovernmental Support Agreements, then any intra-DOD purchase over the micropurchase threshold requires D&F in accordance with FAR 17.503 (see para. C.1. above for requirements).**
- (c) **Air Force. Guidance is that intra-DOD Economy Act orders do not require a FAR 17.503 D&F. (See AFFARS IG5317.5) (Jan 2005).**
- (d) **Navy. Apparently consistent with current Army policy, in that no D&F required if interservice support agreement satisfies requirements of DOD Instruction 4000.19. Presumably, if the MIPR does not satisfy the DODI, then a FAR 17.503 D&F would be required. NMCARS Part 5217-503.**

- 2. **Approval Authorities for D&F. FAR 17.503(c); DFAS-IN Reg. 37-1, para. 120702(A & B). (*but see additional DOD requirements discussed below*).**

¹ “In the early 90s, the interpretation of the FAR was that within DOD was intra-agency. However, in the late 90s, probably when the DODI 4000.19 was revised, the interpretation became that intra-agency was Army only. (My colleagues and I have discussed issue this over the years.)

The DODI 4000.19 addresses having a formal support agreement (ISSA, MOA, MOU) with another organization to include DOD organizations beyond Army which would require GO/SES approval to accomplish actions that are offloaded. When a support agreement exists, it satisfies the requirement for a D&F because the procurement file would document that this agreement exists. The Head of Agency signs the support agreement not the MIPR or a D&F. The agreement signifies the determination and no written determination is required for agreements between DOD Activities. So, if there is not a support agreement then a D&F is needed.”

- Email message from Barbara Binney to MAJ Michael Devine, Contract and Fiscal Law Department, TJAGLCS, 10 January 2006.

- a. The requesting agency's contracting officer with authority to contract for the supplies or services to be ordered (or other person designated by the agency head) must approve the D&F.
- b. The Senior Procurement Executive of the ordering agency must approve the D&F if the performing agency is not covered by the FAR.

D. **DOD Requirements.** (Note, for orders going OUTSIDE of DoD, these requirements *heighten the approval levels for the D&F* above what the FAR requires in Subpart 17.503, as discussed above, and these requirements *make the findings more stringent because the findings required when outside agency contracting is required (subpara C.1.b above) are conjunctive rather than disjunctive as they are in the FAR*)).

1. SECDEF Memo. Memorandum, Secretary of Defense, to Secretaries of the Military Departments, Subject: Use of Orders Under the Economy Act (8 Feb 94)(Appendix C). As a result of DOD abuses of Economy Act transactions, the Secretary of Defense has ordered that, before issuing an Economy Act order for contract action outside of DOD, the head of the agency or designee shall determine that:
 - a. The ordered supplies or services cannot be provided as conveniently and cheaply by contracting directly with a private source;
 - b. The servicing agency has unique expertise or ability not available within DOD; and
 - c. The supplies or services are clearly within the scope of activities of the servicing agency and that agency normally contracts for those supplies or services for itself.
2. Implementation of the SECDEF Memo. Both the Army and Air Force have directed that before Economy Act orders are released outside of DOD for contract action, the requiring activity must prepare a D&F addressing the elements in the SECDEF memo.

- a. Within the Army, if requested, the contracting officer who normally would contract for the requesting agency should advise in the determination process. DFARS 217.503
 - b. The Air Force requires review of the D&F by a contracting officer as a "business advisor" to the approval authority.
- 3. Delegation of Authority. Pursuant to the SECDEF memo, the Army and Air Force have delegated their authority to approve Economy Act determinations for orders to non-DOD agencies.
 - a. A SES or General Officer commander/director of the requesting activity must approve the written determination if the performing agency is required to comply with the FAR.
 - b. The Senior Procurement Executive of the requesting activity must approve the written determination if the performing agency is not required to comply with the FAR.
- 4. Scope of Applicability. The procedures of FAR Subpart 17.5, DFARS Subpart 217.5, and DODI 4000.19 apply to all purchases, except micro-purchases, made for DOD by another agency (unless more specific statutory authority exists). This includes orders under a task or delivery order contract entered into by the other agency. DFARS 217.500. See also Pub. L. No. 105-261 § 814, 112 Stat. 1920, 2087-88 (1998).

E. Additional DoD Regulatory Guidance (applicable to orders over the SAT going outside of DoD). FAR Subpart 17.5; DOD 7000.14-R, Vol. 11A, para. 0304; DODI 4000.19; DFAS-IN Reg. 37-1, paras. 120501-120703; AFI 65-601, vol. I, paras. 7.19 to 7.25.

- 1. Office of the Secretary of Defense Memo: Proper Use of Non-DOD Contracts (29 Oct 2004). Army implementation thru USD (AL&T) Memo: Proper Use of Non-DOD Contracts (12 July 2005). **(See Outline Appendices).**

- a. Non-DOD contract vehicles (orders placed by DOD and contracts awarded or orders placed by non-DOD entities on behalf of DOD, including franchise funds) that exceed the simplified acquisition threshold must meet reviewing and approval requirements by January 1, 2005.
 - b. The reviewing and approval requirement must include:
 - (1) evaluating whether using a non-DOD contract is in the best interest of DOD;
 - (2) determining the requirement is within the scope of the contract to be used;
 - (3) ensuring the funding is in accordance with appropriation limitations;
 - (4) including all DOD unique requirements (statutes, regulations, directives . . .) in the order or contract; and
 - (5) collecting data on the use of assisted acquisitions for analysis.
 - c. Extensive data collection and reporting requirements for such acquisitions imposed by these memoranda.
2. The Office of Management and Budget (OMB) has issued guidance requiring agencies engaged in intragovernmental exchanges to obtain and use Dun & Bradstreet Universal Numbering System (DUNS) numbers as unique business location identifiers. Since October 1, 2003, certain purchases for goods and services that equal or exceed \$100,000 per order must be transmitted via the intragovernmental electronic commerce portal. See OMB Memorandum M-03-01 (Oct. 4, 2002), *available at* <http://www.whitehouse.gov/omb/memoranda/m03-01.html>.
3. Ordering Procedures.

- a. Orders must include all supporting data necessary to prepare the required contract documentation, including a description of the requirement, delivery terms, fund citation, payment provisions, and required determinations.
- b. Orders must be specific, definite, and certain both as to the work encompassed by the order and the terms of the order itself.
- c. Economy Act orders citing an annual or multiyear appropriations must serve a bona fide need arising, or existing, in the fiscal year(s) for which the appropriation is available for obligation.
- d. As the work to be performed under Economy Act orders shall be expected to begin within a reasonable time after its acceptance by the servicing activity, the requesting activity should ensure in advance of placing an order that such capability exists.
- e. Normally, DOD ordering activities issue Economy Act orders using DD Form 448, Military Interdepartmental Purchase Request (MIPR) (Appendix A).
- f. DFARS 217.504 requires that a copy of the completed D&F accompany the MIPR / order when sent to the servicing agency.

4. Acceptance.

- a. The accepting officer must be a duly authorized employee of the performing activity.
- b. If the ordering activity uses a MIPR, the performing activity accepts the order by issuing a DD Form 448-2, Acceptance of MIPR (Appendix B). Otherwise, the terms of the interagency agreement will determine the method of acceptance.
- c. If the activity issues a MIPR on a reimbursable basis, acceptance establishes fund obligation authority in the performing activity account, and the activity may incur costs in accordance with the terms of the order.

- d. Acceptance must indicate whether reimbursement will be on a "fixed-price" or "cost-incurred" basis. Acceptance on a fixed-price basis is required if:
 - (1) Billable unfunded costs will be included on the accepted price of the order;
 - (2) Each item or service ordered is priced separately;
 - (3) The price does not include substantial contingencies;
 - (4) The cost estimate included consideration of expected variances;
 - (5) Neither activity expects many change orders; and
 - (6) The requirement is of the type for which a fixed-price basis is practicable.

5. Payment and Billing.

- a. The performing activity may require advance payment for all or part of the estimated cost of the supplies or services. See AFI 65-601, vol. I, para. 7.25.3 (list of agencies requiring advance payment).
- b. Bills or requests for advance payment are not subject to audit before payment.
- c. The performing activity cannot exceed the amount of the order or direct fund cite. It must curtail or cease performance to avoid exceeding the estimated cost, and notify the ordering activity immediately.

6. Disputes.

- a. No formal method for dispute resolution exists for Economy Act transactions.
- b. The ordering and performing agencies "should agree" to procedures for the resolution of disagreements that may arise under interagency acquisitions, including the use of a third party forum. FAR 17.504(c).

F. Problem Areas. See DOD Inspector General Audit Report Nos. 94-008 (Oct. 20, 1993), 93-068 (Mar. 18, 1993), 93-042 (Jan. 21, 1993), 92-069 (Apr. 3, 1992). See also, DOD Inspector General Audit Report No. D-2002-109 (Jun. 19, 2002), (discussing the United States Army Claims Service's (USACS) potential Anti-Deficiency Act violations related to USACS' transactions with the General Administration Service Information Technology Fund), *available at*, <http://www.dodig.osd.mil/audit/reports/fy02/02-109.pdf>.

1. Failing to obtain proper approval. See FAR 17.503(c) (requiring contracting officer, or another person designated by the agency head, to approve Economy Act determination)
2. Issuing orders to the Department of Energy (DOE) Tennessee Valley Authority (TVA) for common supplies and services, the acquisition of which do not require the special expertise of DOE/TVA management and operating contractors.
3. Using the intragovernmental purchase process to avoid competition requirements, or to "dump" year-end funds.
4. Failing to determine whether an intragovernmental acquisition is the most economical and efficient method to obtain goods and services.
5. Citing Operations and Maintenance (O&M) funds on an order for investment/capital end items.
6. Improperly classifying an Economy Act order as a project order to avoid the deobligation (recovery) requirements.

7. Paying more than the "actual cost" of the goods or services provided. See 31 U.S.C. § 1535(b); Use of Agencies' Appropriations to Purchase Computer Hardware for Dep't of Labor's Executive Computer Network, B-238024, June 28, 1991, 70 Comp. Gen. 592 (1991).
8. Ordering in excess of the maximum quantities specified in a performing activity's requirements contract. Liebert Corp., B-232234, Apr. 29, 1991, 91-1 CPD ¶ 413.
9. Ordering improperly from nonappropriated fund instrumentalities. Compare 10 U.S.C. § 2482a (authorizing contracts or other agreements between service exchanges/MWR activities and federal departments) and 10 U.S.C. § 2424 (authorizing contracts using noncompetitive procedures between DOD and service exchange stores outside the United States for supplies and services up to \$50,000) with Dep't. of Agriculture Graduate Sch.--Interagency Orders for Training, B-214810, 64 Comp. Gen. 110 (1984) and Obtaining Goods and Servs. from Nonappropriated Fund Activities through Intra-Departmental Procedures, B-148581, 58 Comp. Gen. 94 (1978).

G. Other Economy Act Applications.

1. Interagency details.
 - a. The Economy Act authorizes interagency details of employees. The Honorable Robert W. Houk, B-247348, June 22, 1992 (unpub.) (unauthorized detail caused Antideficiency Act violation); Nonreimbursable Transfer of Admin. Law Judges, B-221585, 65 Comp. Gen. 635 (1986). See Federal Personnel Manual, ch. 300, subch. 8. See also 5 U.S.C. § 3341 (authority for intra-agency details). Cf. 10 U.S.C. § 374 (military personnel support to law enforcement agencies).

- b. Details must be on a reimbursable basis unless: a law specifically authorizes nonreimbursable details; the detail involves a matter similar or related to matters ordinarily handled by the detailing agency, and will aid the detailing agency's mission; or the detail is for a brief period and entails minimal cost. See Department of Health & Human Servs. Detail of Office of Community Servs. Employees, B-211373, 64 Comp. Gen. 370 (1985); The Honorable William D. Ford, B-224033, Jan. 30, 1987 (unpub.); Details to Congressional Comms., B-230960, Apr. 11, 1988 (unpub.).
- 2. Interservice Support Agreements. From a fiscal standpoint, the Economy Act may form the basis for interservice agreements that involve recurring support between military departments, or between a military department and another federal agency. See DOD Instruction (DODI) 4000.19, Interservice and Intragovernmental Support (9 Aug. 1995); AFI 65-601, vol. I, ch. 7 (Oct. 94).
 - a. Memorialize support agreements with DD Form 1144, Support Agreement, or similar format that contains all the information required on the form. See DODI 4000.19, para. D.5.
 - b. Support is reimbursable to the extent that it increases the support supplier's direct costs. Costs associated with common use infrastructure are non-reimbursable, unless provided solely for the use of one or more tenants. DODI 4000.19, para. D.6.

III. PROJECT ORDERS.

- A. General. The Project Order Statute provides DOD with interdepartmental authority to order goods and services, separate and distinct from the Economy Act.
- B. Statutory Provisions. 41 U.S.C. § 23 (DOD); 14 U.S.C. § 151 (Coast Guard).
 - 1. The statute applies to transactions between military departments and DOD government-owned, government-operated (GOGO) establishments for work related to military projects. Matter of John J. Kominski, B-246773, (May 5, 1993), 72 Comp. Gen. 172 (the Economy Act, not the Project Order Statute, applies to DOD orders to non-DOD agencies).

2. Orders placed with government-owned establishments shall be treated as if placed with commercial activities.
3. Appropriations shall remain available for the payment of the obligations, as if the obligations arose under a contract with a commercial activity.
4. The statute does not require special determinations, as with Economy Act orders.

C. General Regulatory Guidance. DOD 7000.14-R (Department of Defense Financial Management Regulation) Vol. 11A, Ch. 2; AFI 65-601, vol. I, para. 7.16.5; DFAS-IN Reg. 37-1, para. 1208.

1. A project order is an order for specific types of goods or services. A project order may remain open until the work is done.
2. Activities may issue project orders only to Government-Owned/Government-Operated (GOGO) facilities within DOD. GOGO facilities include shipyards, arsenals, ordnance plants, manufacturing or processing plants or shops, equipment overhaul or maintenance shops, research and development laboratories, testing facilities, and proving grounds which are owned and operated within DOD. DOD 7000.14-R, Vol. 11A, Ch. 2, para. 020303. See Matter of John J. Kominski, supra.
3. Activities may issue project orders only for the following types of goods and services:
 - a. Production, maintenance, or overhaul of:
 - (1) Missiles and other weapons;
 - (2) Vehicles;
 - (3) Ammunition, clothing, and machinery;
 - (4) Other military supplies or equipment; and

- (5) Component and spare parts for the above.
 - b. Research, development, test, and evaluation.
 - c. Minor construction or maintenance of real property.
4. Activities shall not issue project orders for:
- a. Major construction;
 - b. Education, training, subsistence, storage, printing, laundry, welfare, transportation, travel, or communications; or
 - c. Any requirement where a contractual relationship cannot exist.

D. Ordering Procedures.

- 1. Project orders require no specific form, but DOD activities often use MIPRs. The order must be specific, definite, and certain. But see DFAS-IN Reg. 37-1, para. 120803 (requiring use of MIPRs for project orders).
- 2. Activities issue only reimbursable orders.
- 3. The order must indicate whether it will be performed on a cost basis or fixed-price basis. Follow the guidance set forth above for Economy Act orders to determine whether a fixed-price basis is required. See Sec. II.E.4.d, supra.

E. Acceptance and Performance.

- 1. Acceptance must be in writing. If the ordering activity issues a MIPR, the performing activity accepts on a MIPR.

2. At the time of acceptance, there must be evidence that the work will commence within a reasonable time. DOD adopted the Army's standard of 90 days. DOD 7000.14-R, Vol. 11A, ch. 2, para. 020510; DFAS-IN Reg. 37-1, para. 120803.
 - a. Project orders must serve a bona fide need existing in the fiscal year in which issued; otherwise, a valid obligation is not accomplished.
 - b. Agencies may not issue project orders for the primary purpose of continuing the availability of appropriations.
 3. A GOGO facility must be "substantially in a position" to meet the ordering activity's requirement. Regulations require that the project order recipient incur costs "of not less than 51 percent of the total costs attributable to rendering the work or services ordered." DOD 7000.14-R, Vol. 11A, ch. 2, para. 020515.
- F. GAO Review. Generally, the GAO does not review agency decisions to perform in-house, rather than contract out, as they regard such decisions as matters of executive branch policy. SRM Mfg. Co., B-277416, Aug. 4, 1997, 97-2 CPD ¶ 40; Boulder Scientific Co., B-225644, Mar. 20, 1987, 87-1 CPD ¶ 323.

IV. GOVERNMENT EMPLOYEES TRAINING ACT (GETA).

- A. General. GETA provides guidance and specific authority for intragovernmental training of employees.
- B. Statutory Provisions. 5 U.S.C. § 4104.
 1. Federal agencies must provide for training, insofar as practicable, by, in, and through government facilities under the jurisdiction or control of the particular agency.

2. When internal training is not possible, GETA authorizes interagency training on either a reimbursable or non-reimbursable basis. As GETA provides independent fund transfer authority, the requirements and restrictions of the Economy Act are inapplicable. Army Corps of Engineers - Disposition of Fees Received from Private Sector Participants in Training Courses, B-271894, July 24, 1997 (unpub.); To Walter L. Jordan, B-241269, Feb. 28, 1991 (unpub.).
- C. Regulatory Guidance. Federal Personnel Manual (FPM), Chap. 410, Subch. 4-3 (Oct. 22, 1981) (cancelled by the Office of Personnel Management (OPM) as of 31 December 1994, but still relied upon as federal personnel guidance).
1. An agency that operates an interagency training facility may accept funds from other agencies for part or all of the costs of training their employees through reimbursements or other cost-sharing arrangements.
 2. An agency may not obtain reimbursement for training if funds are already provided for interagency training in its appropriation.

V. THE CLINGER-COHEN ACT OF 1996.

- A. General. Section 5112(e) of the FY 1996 National Defense Authorization Act (Pub. L. No. 104-106) (permanently codified at 40 U.S.C. § 1412(e)) instructed the Director, Office of Management and Budget (OMB), to designate as considered appropriate, one or more heads of executive agencies as executive agent for Government-wide acquisitions of information technology.
- B. Implementation.
1. OMB has designated the General Services Administration (GSA) as the executive agent for certain government-wide acquisitions of information technology (IT).
 2. The scope of the designation is limited to programs that are funded on a reimbursable basis through the Information Technology Fund established by 40 U.S.C. § 757. These programs include the Federal Systems Integration and Management Center (FEDSIM) and Federal Computer Acquisition Center (FEDCAC), as well as other existing government-wide IT acquisition programs.

3. The OMB designation, in combination with 40 U.S.C. § 757, provides separate authority for acquisition from these GSA programs. Current issues with FEDSIM and other GSA programs involve the expense of the programs and the requirement that DOD orders represent bona fide needs of the underlying DOD appropriation. DFAS-IN Reg. 37-1, para. 080609. See e.g., Floro & Associates, B-285.481.4, B-285.481.4, Oct. 25, 2000, 2000 CPD ¶ 172 (GAO concludes that GSA's task order for "management services" was materially different from that of the underlying contract, which required "commercially off-the-shelf hardware and software resulting in turnkey systems for GSA's client agencies.")

VI. REQUIRED SOURCES.

- A. Source Priorities. 41 C.F.R. § 101-26.107; FAR 8.001. Generally, agencies shall adhere to the following orders of precedence when obtaining supplies or services:

1. Supplies.

- a. Agency inventory;
- b. Excess from other agencies;
- c. Federal Prison Industries, Inc.;
- d. Committee for Purchase from People Who are Blind or Severely Disabled;
- e. Wholesale supply sources;
- f. Federal supply schedules; and
- g. Commercial sources.

2. Services.

- a. Committee for Purchase from People Who are Blind or Severely Disabled;
 - b. Federal supply schedules; and
 - c. Federal Prison Industries, Inc., or commercial sources.
- B. Federal Prison Industries, Inc. (FPI or UNICOR). 18 U.S.C. §§ 4121-4128; 28 C.F.R. §§ 301-345; FAR Subpart 8.6; <www.unicor.gov>. Formerly, Federal agencies and institutions were required to purchase any FPI products that met their requirements and were available. 18 U.S.C. § 4124. See Battery Assemblers, Inc., B-260043, May 23, 1995, 95-1 CPD ¶ 254 (agency reasonably determined UNICOR's price did not exceed "current market price"); Hiltronics Corp., B-238142, Apr. 11, 1990, 90-1 CPD ¶ 384; Forest Serv.--Requirement to Procure from Fed. Prison Indus., Inc., A-67190, 62 Comp. Gen. 617 (1983); Minx Prods., Inc., B-175249, Apr. 11, 1972 (unpub.).
 - 1. However, the National Defense Authorization Act of 2002 qualified FPI's mandatory source status and now **DoD agencies** are required to compare the price, quality, and time of delivery of FPI products to private industry products. If the FPI product is not comparable, the contracting officer may conduct a competitive procurement. FPI is authorized to compete in the competitive procurement. See 67 Fed. Reg. 20687 (April 26, 2002). The contracting officer has unilateral authority to make comparability determinations. See 68 Fed. Reg. 26,265 (May 15, 2003). DoD agencies are also required to rate FPI's performance, compare it to the private sector, and provide FPI feedback on previously awarded contracts. See 68 Fed. Reg. 28,905 (May 22, 2003). The fiscal 2004 omnibus appropriations bill temporarily extended the 2002 mandate to **civilian agencies**, and the fiscal 2005 omnibus appropriations bill made the requirement permanent.
 - 2. FPI lists its products and services in the "Schedule of Products made in Federal Penal and Correctional Institutions" (Schedule).
 - 3. An activity must obtain clearance from FPI to acquire Schedule supplies from other sources, except when:
 - a. The contracting officer determines the FPI product is not comparable in price, quality or delivery;

- b. Public exigency requires immediate delivery or performance;
 - c. Used or excess supplies are available;
 - d. Goods are acquired and used outside the United States;
 - e. Orders totaling \$2500 or less or acquiring services. FAR 8.605.).
 - 4. Disputes regarding price, quality, and suitability of supplies, excluding comparability determinations made by contracting officers, are subject to arbitration. FAR 8.602(f).
- C. Committee for Purchase From People Who Are Blind Or Severely Disabled (Committee). 41 U.S.C. §§ 46-48c; 41 C.F.R. Part 51; FAR Subpart 8.7.
- 1. Like FPI, the Committee publishes a "Procurement List" of supplies and services. These products and services are available from nonprofit agencies for the blind or severely disabled. The Committee may request that a contracting activity assist in determining whether a workshop has the capability to perform a requirement. See FAR 9.107. An agency must consider acquiring services from a workshop only if the agency otherwise intends to contract for them. See Rappahannock Rehab. Facility, Inc., B-222961, Sept. 10, 1986, 86-2 CPD ¶ 280; Kings Point Mfg. Co., B-185802, Mar. 11, 1977, 77-1 CPD ¶ 184.
 - 2. Activities must purchase listed supply requirements from applicable nonprofit agencies (workshops) at prices established by the Committee, unless the supply is available from FPI. The Committee, however, has priority over FPI for listed services. See Western States Mgmt. Servs., Inc., B-233576, Dec. 8, 1988, 88-2 CPD ¶ 575; Abel Converting Inc., B-229581, Mar. 4, 1988, 88-1 CPD ¶ 233.
 - 3. Agencies may obtain requirements from commercial sources only if specifically authorized by the applicable central nonprofit agency or the Committee. The central nonprofit agency must grant an exception if:
 - a. The workshops cannot perform timely, and the commercial sources can; or

- b. The workshops cannot produce the quantities required economically.
- 4. Activities place orders for supplies with the GSA, Defense Logistics Agency (DLA), or the Department of Veterans Affairs (VA). In some cases, an activity may order directly from a nonprofit agency/workshop. The governing central nonprofit agency must authorize a direct purchase.
- 5. Activities may address complaints about the quality of supplies distributed by GSA or DLA to the pertinent agency. For supplies or services obtained directly from a workshop, activities may address complaints to the workshop, with a copy to the central nonprofit agency.
- 6. Workshops may compete against commercial sources on acquisitions for supplies or services not included in the Procurement List.
- 7. The GAO will not review an agency's decision to purchase goods or services from workshops. Microform Inc., B-246253, Nov. 13, 1991, 91-2 CPD ¶ 460.
- D. DOD Coordinated Acquisition. 10 U.S.C. § 2309; DFARS Subpart 208.70; DOD Dir. 4140.26, Integrated Materiel Management of Consumable Items.
 - 1. DOD agencies may obligate funds for the acquisition of supplies only under regulations prescribed by the Secretary of Defense. 10 U.S.C. § 2202(a).
 - 2. Under coordinated acquisition procedures, a DOD component ("requiring activity") may be required to obtain commodities through another DOD component or GSA ("acquiring activity"). DFARS 208.7003-2. See Tracor, Inc., B-195736, Jan. 24, 1980, 80-1 CPD ¶ 69.
 - 3. Assignments under the Integrated Materiel Management (IMM) Program. DFARS 208.7003-1; DOD 4140.26M. Activities must obtain assigned items from the IMM manager unless:
 - a. There is an unusual and compelling urgency;

- b. The IMM manager codes an item for local purchase;
 - c. Purchase by the requiring activity is in the best interest of the government. This exception does not apply to:
 - (1) Items critical to the safe operation of a weapon system;
 - (2) Items with special security characteristics;
 - (3) Dangerous items (e.g., explosives, munitions).
4. Assignments under the Coordinated Acquisition Program. DFARS 208.7003-2. Activities must submit all contracting requirements for assigned items to the acquiring activity, unless:
- a. The activity must obtain the item from a FAR 8.001 required source;
 - b. The activity obtains the item from the IMM manager;
 - c. The requirement does not exceed the simplified acquisition threshold, and direct contracting is in the activity's interest;
 - d. The activity needs the item in an emergency;
 - e. The acquiring activity delegates authority to the requiring activity;
 - f. The item is part of a research and development stage (generally, this exception applies only when RDT&E funds are used);
 - g. National security requires limitation of sources;
 - h. The supplies are available only from the original source for a follow-on contract;

- i. The item is directly related to a major system and is design-controlled by and acquired by the manufacturer;
 - j. The item is subject to rapid design changes which require continual contact between industry and the requiring activity to ensure the item meets requirements; or
 - k. The item is noncataloged and represents a nonrecurring requirement (i.e., a "one-time buy").
5. Normally, under the Coordinated Acquisition Program, requiring activities use MIPRs to place orders. DFARS 208.7004-1.
- a. The acquiring activity determines whether the order will be on a reimbursable (category I) or direct citation (category II) basis. DFARS 208.7004-2(b).
 - b. The acquiring activity may use a reimbursable order if delivery is from existing inventories or by diversion from existing contracts of the acquiring activity; production or assembly is at government-owned plants; the requirement involves assembly of end items by the acquiring department; or the acquiring activity will make contract payments without reference to deliveries of end items. DFARS 208.7004-2(b).
 - c. If a direct citation MIPR cites funds that will expire after 30 September, the acquiring activity must receive the MIPR by 31 May. DFARS 208.7004-4(a). The acquiring activity must accept MIPRs within 30 days. DFARS 208.7004-2(a).

VII. CONCLUSION.

CHAPTER 27

INTELLECTUAL PROPERTY

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CHAPTER 27

INTELLECTUAL PROPERTY

I. REFERENCES.

- A. Department of Defense, Intellectual Property: Navigating Through Commercial Waters (Version 1.1, Oct. 15, 2001) (a.k.a. “The DOD IP Guide”), located at: <http://www.acq.osd.mil/ar/doc/intelprop.pdf>.
- B. RALPH C. NASH, JR. & LEONARD RAWICZ, INTELLECTUAL PROPERTY IN GOVERNMENT CONTRACTS (George Washington University ed., 5th ed. 2001). A three-volume treatise.
- C. MATTHEW S. SIMCHAK & DAVID A. VOGEL, LICENSING SOFTWARE AND TECHNOLOGY TO THE U.S. GOVERNMENT: THE COMPLETE GUIDE TO RIGHTS TO INTELLECTUAL PROPERTY IN PRIME CONTRACTS AND SUBCONTRACTS (2000). A one-volume treatise.
- D. Major Gregg Sharp, *A Layman’s Guide to Intellectual Property in Defense Contracts*, 33 PUB. CONTRACT. L.J. (2003).

II. OVERVIEW.

- A. Intellectual property (IP) is a subdivision of property dealing with inventions and other innovative concepts or ideas created by a person’s intellectual thought processes.
- B. It is valuable because laws grant the owner the ability to exclude others from making use of the property.
- C. The purposes behind protecting intellectual property are myriad and sometimes diverse. These purposes include, but are not limited to the following: providing incentives to inventors/creators to encourage scientific and technological advances, innovation, and creativity; providing a *quid pro quo* between inventor/creators and the public; promoting consumer protection; and upholding the standard of commercial ethics.

Major Marci Lawson, USAF
157th Contract Attorneys’ Course
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III. TYPES OF INTELLECTUAL PROPERTY.

A. Patents.

1. [Art. I, § 8, cl. 8 of the U.S. Constitution](#) (in order “[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”) authorizes the patent system. Based upon this authority, Congress enacted the Patent Act of 1952 (Ch. 950, 66 Stat. 792, codified as amended at [35 U.S.C. §§ 1-376](#)).
2. A patent is a written instrument issued by the U.S. Patent and Trademark Office (PTO), an agency of the Department of Commerce.
3. Patents give the inventor the right to exclude others from making, using, or selling the invention for a period of 20 years. [35 U.S.C. § 154](#).
4. Types of patents:
 - a. Plant (e.g. a new variety of rose bush). Governed by [35 U.S.C. §§ 161-164](#);
 - b. Design (e.g. a new design for a piece of furniture) Governed by [35 U.S.C. §§ 171-173](#);
 - c. Utility. Governed by [35 U.S.C. §§ 100-157](#). Can be a “new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.” [35 U.S.C. § 101](#). Examples would be: instant film processing (process); the steam engine (machine); and nylon (product).
5. The inventor must apply for a patent, and as part of that application process, must describe the invention in such a manner that another person can duplicate the invention. [35 U.S.C. §§ 111 and 112](#).
6. The invention may not merely represent an obvious improvement to an existing invention within the public domain. [35 U.S.C. § 103](#).

7. Generally, if an inventor places her/his invention into the public domain prior to applying for a patent (publicly using it, writing a trade article about it, or selling it), s/he cannot obtain a patent on that invention. The exception to this general proposition is if a valid patent application is filed within one year of the invention's introduction into the public domain. [35 U.S.C. § 102\(b\) and \(d\)](#).
8. Multiple inventors. [35 U.S.C. § 102\(g\)](#).
 - a. Priority is determined by considering the date of conception and the date of reduction to practice. Reduction to practice can be actual or constructive.
 - b. Instant film scenario: conception occurs when a scientist envisions you could produce instant film by including the normal film processing chemicals within an enclosed piece of film paper; actual reduction to practice occurs when someone actually encloses the chemicals into the film paper and gets the process to work.
 - c. If Company A conceives and actually reduces an invention to practice before Company B, it will receive priority and be issued a patent even if Company B beats A to the patent office.
 - d. If Company A conceives an invention before Company B, but Company B actually reduces the invention to practice before Company A, Company A must demonstrate that it acted diligently to reduce to practice or else priority will go to Company B.

B. Trade Secrets.

1. No Constitutional authority so there is very little federal law.
 - a. There are two federal acts, one that makes it a crime to steal trade secrets and one that makes it a crime for a Federal Government employee to release confidential or proprietary information gained during the course of her employment. See [18 U.S.C. §§ 1831-1839](#) and [18 U.S.C. § 1905](#) respectively.

- b. There is no federal law permitting inventors to sue those who misappropriate their property, however.
- 2. State Law. To protect trade secrets from misappropriation, the various states rely on some or all of the following sources:
 - a. The Restatement (First) of Torts §§ 757-759.
 - b. The Uniform Trade Secrets Act. See UTSA with 1985 Amend. PREFATORY NOTE, 14 U.L.A. 433, 434-35 (2000) available at <http://www.law.upenn.edu/bll/ulc/fnact99/1980s/utsa85.pdf>.
 - c. The Restatement (Third) of Unfair Competition §§ 39-45.
- 3. [Uniform Trade Secrets Act \(UTSA\)](#). Produced in 1979 and amended in 1985. Adopted in some form by 45 states and the District of Columbia.
- 4. Definition of trade secret is any information that has “economic value . . . from not being generally known . . . and is the subject of efforts that are reasonable under the circumstances to maintain secrecy.” [UTSA § 1\(4\)](#).
 - a. Majority of trade secret litigation centers on whether the company seeking protection took reasonable measures to keep the information a secret.
 - b. The only way an owner of a trade secret can economically benefit from it is to sell access to that information to others.
 - c. As long as the disclosure is made to a recipient who agrees to keep the information confidential, the trade secret retains its protection.
- 5. The information can be of virtually any type, including but not limited to: “a formula, pattern, compilation, program, device, method, technique, or process.” [UTSA § 1\(4\)](#).
- 6. There is no limit to how long a trade secret may last; duration depends only upon how long it remains secret and retains value.

7. Examples of Trade Secrets: the formula for Coca-Cola™ or the recipe for Mrs. Field's™ chocolate chip cookies.

C. Copyright.

1. Authorized by [Art. I, § 8, cl. 8 of the U.S. Constitution](#).
2. Congress extensively amended Copyright Laws in 1976. See Pub. L. No. 94-553, 90 Stat. 2599 (1976) (codified at [17 U.S.C. §§ 101-702](#)).
3. Prior to 1976, there was a dual federal and state system of copyright protection. The Copyright Act of 1976 preempted state laws. [17 U.S.C. § 301](#).
4. The Register of Copyrights within the Library of Congress (LOC) is the Government agency that has oversight responsibility for the copyright system. [17 U.S.C. § 701](#).
5. Copyright laws give the author of an **original** work the exclusive right to:
 - a. Reproduce the copyrighted work;
 - b. Prepare derivative works based upon the original work;
 - c. Distribute copies of the work to others;
 - d. Perform the work in public; and
 - e. Display the work in public. [17 U.S.C. § 106](#).
6. The types of original works that may be copyrighted include, but are not limited to:
 - a. Literary works;
 - b. Musical works, including any accompanying words;

- c. Dramatic works, including any accompanying music;
 - d. Pantomimes and choreographic works;
 - e. Pictorial, graphic, and sculptural works;
 - f. Motion pictures and other audiovisual works;
 - g. Sound recordings; and
 - h. Architectural works. [17 U.S.C. § 102\(a\)](#).
7. The term of this right varies. For a sole author who created a work after 1998, the term is for the life of the author plus 70 years. Alternate terms depend upon when the work was created, whether there was more than one author, whether the work was done anonymously, and whether the work qualifies as a “work made for hire.” [17 U.S.C. §§ 301-305](#).
 8. Although the work has to be “original,” the statute does not define the term. The courts have interpreted the term to merely require that the work be independently created and possess some degree of creativity (unlike patents, the work need not entail more than an obvious revision to existing art). Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991).
 9. Authors may (but are not required to) register for a copyright in a work by depositing a copy of the work at the LOC for review. [17 U.S.C. § 407\(a\)](#). Additionally, an author may place the work on notice that s/he is claiming a copyright in the work by placing a notice on all distributed copies of the work. This notice commonly consists of the symbol “©” followed by the year the work was first published and the name of the author. [17 U.S.C. § 401](#).
 10. Distribution of material without this notice may invalidate the copyright under certain circumstances. [17 U.S.C. § 405\(a\)](#). Even where the copyright is not invalidated, the author will not be able to recover royalties from an innocent infringer, one who was unaware of the copyright. [17 U.S.C. § 405\(b\)](#).

D. Trademark.

1. The Constitution does not expressly grant Congress any authority to enact Trademark Laws.
2. Many states enacted trademark laws.
3. In 1870, Congress, relying upon its inherent authority under the Constitution's Interstate Commerce Clause, enacted the first federal trademark statute, but opted not to preempt state law.
4. The Lanham Act of 1946, Ch. 540, 60 Stat. 427 (1946) (codified as amended at [15 U.S.C. §§ 1051-1129](#)) established the current federal trademark law.
5. Trademark law allows manufacturers and service providers to use (and restrict others from using) marks that distinguish their goods or services from the goods and services of others. [15 U.S.C. § 1127](#).
6. Types of marks:
 - a. Trademarks (Coke);
 - b. Service marks (McDonald's or Golden Arches symbol);
 - c. Collective marks. Used by members of an organization or group to distinguish their products or services from non-group members (PGA);
 - d. Certification marks. Used to show the product or service meets certain characteristics or function levels (Underwriters Laboratories).
7. The first user of a mark that is "distinctive" or "descriptive but having acquired secondary meaning" has the right to continue to make use of that mark so long as the mark is used in commerce in association with goods or services. The first user can exclude others from using the mark in a confusingly similar manner.

8. Registration of the mark with the PTO is not required to gain these rights, but doing so establishes prima facie evidence of the registrant's exclusive right to use the mark. [15 U.S.C. §§ 1051\(a\) and 1057\(b\)](#). If the user registers the mark and makes continuous usage of the mark for five years, the user's right to continued use of the mark becomes uncontestable. [15 U.S.C. § 1058](#).
- E. Multiple Avenues of Protection. Many innovations/creative concepts may be protected under more than one of the above areas.
1. Opting to protect under one regime often will not prevent you from protecting under an alternate regime.

Example: furniture design (design patent and/or copyright).
 2. Sometimes inventors will have to choose among alternate regimes.

Example: software source code (trade secret or utility patent).

IV. RIGHTS IN PATENTS UNDER GOVERNMENT CONTRACTS.

- A. The Bayh-Dole Act (Pub. L. No. 96-517, 94 Stat. 3019 and codified at [35 U.S.C. §§ 200-212](#)) is the primary source of rights and duties in this area.
1. Prior to World War II, the Federal Government had very little role in funding research and development (R&D) of any kind. After World War II, the Government's desire to maintain a standing military, explore space, and develop nuclear energy caused it to become the largest sponsor of R&D.
 2. There was initially a great deal of disparity among the federal agencies concerning who took what rights in a patent. Some agencies took title to the patent, while others left ownership with the inventor and merely required a license.

3. To remedy the disparity and to attract more contractors, Congress passed the Bayh-Dole Act in 1980, which gave the patent title to the inventor and required the agency to take certain rights in the invention. [35 U.S.C. § 200](#).
4. Only small and non-profit firms fall under the Bayh-Dole Act. [35 U.S.C. § 201\(c\)](#). Congress feared that granting title in inventions to large firms would enable them to monopolize their respective technological fields.
5. A 1983 Presidential Memorandum extended coverage of the Act to large, for-profit firms as well. Presidential Memorandum on Governmental Patent Policy to the Heads of Executive Departments and Agencies, Feb. 18, 1983 (reprinted in 1983 Public Papers 248). This memo may be waived under certain circumstances.

B. Notice of Invention.

1. The contractor must timely notify the Government when it becomes aware of an invention it has either conceived or reduced to practice under a Government contract and which it believes may be patentable. [35 U.S.C. § 202\(c\)\(1\)](#); [FAR 52.227-11\(c\)](#); [FAR 52.227-12\(c\)](#); [FAR 52.227-13\(e\)](#).
2. This puts the Government on notice that it needs to monitor the contractor to ensure the contractor proceeds diligently.
3. Statute requires notification within a reasonable time. The FAR sets a time limit of two months after the inventor notifies the contractor about the invention or six months after the contractor otherwise becomes aware of the invention. [FAR 52.227-12\(c\)\(1\)](#) and [FAR 52.227-13\(e\)\(2\)](#); see also [FAR 52.227-11\(c\)\(1\)](#) (establishing only a time limit of two months after inventor notification to the contractor).
4. The contractor must also completely disclose how the invention works to the Government and also tell the Government if it has taken any action that would statutorily bar issuance of a patent. [FAR 52.227-11\(c\)\(1\)](#); [FAR 52.227-12\(c\)\(1\)](#). In DOD, this disclosure is made on a DD Form 882. [DFARS 227.304-1](#).

C. Election of Title.

1. After notifying the Government, the contractor must decide if it wants to retain title. [FAR 27.302\(b\)](#).
2. By statute, this election must be done within two years. [35 U.S.C. § 202\(c\)\(2\)](#).
 - a. For large, for-profit firms, the FAR shortens this period to eight months. [FAR 52.227-12\(c\)\(2\)](#). The FAR does permit the contractor to ask for an extension of time, however. [FAR 52.227-12\(c\)\(4\)](#).
 - b. For small or non-profit firms, the FAR sets this period at two years. [FAR 52.227-11\(c\)\(2\)](#).
3. If the contractor elects to retain title, it is required to timely file a patent application (prior to a statutory bar). [35 U.S.C. § 202\(c\)\(3\)](#); [FAR 52.227-11\(c\)\(3\)](#); [FAR 52.227-12\(c\)\(3\)](#).

D. Government License. If the contractor retains title, the Government is granted a “nonexclusive, nontransferable, irrevocable, paid-up license” to use the invention or to have someone else use the invention on behalf of the Government. [35 U.S.C. § 202\(c\)\(4\)](#); [FAR 27.302\(c\)](#); [FAR 52.227-11\(b\)](#); [FAR 52.227-12\(b\)](#); [FAR 52.227-13\(c\)\(1\)](#).

Problem: the statute and regulations grant the government a license in inventions either conceived **or** actually reduced to practice during the contract.

E. March-in rights. If the contractor elects to retain title and then does not diligently proceed with filing a patent application, the Government has the right to force the contractor to license the invention to another firm. [35 U.S.C. § 203](#); [FAR 27.302\(f\)](#); [FAR 52.227-11\(j\)](#); [FAR 52.227-12\(j\)](#). The contractor is given procedural due process, including the right to be heard and an opportunity for oral arguments. There is also a mandate that only the head of the agency can exercise these march-in rights. [35 U.S.C. § 203\(2\)](#); [FAR 27.302\(f\)](#); and [FAR 27.304-1\(g\)](#).

- F. Domestic Licensing. The contractor is prohibited from exclusively licensing its patented invention to U.S. firms unwilling to “substantially manufacture” its product within the U.S. [35 U.S.C. § 204](#); [FAR 27.302\(g\)](#); [FAR 52.227-11\(i\)](#); [FAR 52.227-12\(i\)](#); [FAR 52.227-13\(i\)](#). There are exceptions if the contractor can demonstrate it was unable to find a domestic licensee or that domestic manufacturing is infeasible. [35 U.S.C. § 204](#); [FAR 27.302\(g\)](#); [FAR 52.227-11\(i\)](#); [FAR 52.227-12\(i\)](#); [FAR 52.227-13\(i\)](#).

Example: A Contractor develops a new bulletproof material that it patents. The above restrictions force it to only license that invention to firms willing to manufacture bulletproof vests within the U.S.

- G. Compulsory Foreign Licensing. If the contract contains Alternate Clauses I or II of the Patent Rights Clauses, the Government is able to sublicense its rights to a foreign Government. [FAR 52.227-11, Alternate I and II](#); [FAR 52.227-12, Alternate I and II](#); [FAR 52.227-13, Alternate I and II](#).

1. Alternate I under each of the above clauses is used if the government knows of any foreign governments to which it desires to sub-license.
2. Alternate II under each of the above clauses is used if the government has reason to believe that post-award it will enter into a treaty or agreement with a foreign government to which it will want to sub-license.

- H. Subcontractor Inventions.

1. The Bayh-Dole Act prevents prime contractors from obtaining rights in subcontractor inventions within the subcontract itself. [35 U.S.C. § 202\(a\)](#); [FAR 27.304-4](#); [FAR 52.227-11\(g\)](#); [FAR 52.227-12\(g\)](#); [FAR 52.227-13\(h\)](#).
2. The contractor may obtain rights in subcontractor inventions but must do so outside of the subcontract and must pay some additional compensation to the subcontractor. [FAR 27.304-4](#); [FAR 52.227-11\(g\)](#); [FAR 52.227-12\(g\)](#); [FAR 52.227-13\(h\)](#).
3. These same protections are also given to lower tier subcontractors. [FAR 52.227-11\(g\)](#); [FAR 52.227-12\(g\)](#); [DFARS 227.304-4](#); [DFARS 252.227-7034](#).

V. USE OF THIRD-PARTY PATENTS IN A GOVERNMENT CONTRACT.

- A. Background. Contractors may need to utilize inventions made by others when working on Government contracts.
- B. Pre-Award Recognition. Ideally, the Government and/or the contractor will recognize such need pre-award of a contract.
 - 1. If the government realizes, pre-award, that its contractor will need to make use of another's patent, it should place offerors on notice of this need in the solicitation. [FAR 27.304-3](#).
 - 2. The contractor can then obtain a license from that third-party and be reimbursed by the Government for the royalties it pays to the patent owner. In order for reimbursement to occur, however, the contractor must include the license costs in its offer. [FAR 27.204-2](#) and [FAR 52.227-6](#).
- C. No Pre-Award Recognition. If the Government and/or the contractor do not recognize a need to obtain a license on a third-party's invention, the contractor's use of that invention infringes the patent.
 - 1. No injunctive relief. Statutes prevent the patent owner from enjoining use of the invention. [28 U.S.C. § 1498](#); [10 U.S.C. § 2386](#). The patent owner is required to accept a reasonable amount of compensation for the infringement instead. The patent owner may either file an administrative claim or bring suit in the Court of Federal Claims (COFC) for damages.
 - 2. Administrative Claim. Claimants must submit a claim in writing specifying:
 - a. The portion of the patent the owner believes was infringed;
 - b. The government or contractor action that allegedly infringes the patent; and
 - c. The patent owner's rationale of how that action infringes his patent. [DFARS 227.7004](#).

3. COFC Suit. The suit is against the United States not the contractor whose work actually infringes the patent. [28 U.S.C. § 1498\(a\)](#).
- D. Authorization, Consent, and Notice. The FAR mandates inclusion of an “Authorization and Consent” clause in all government contracts in which performance and/or delivery occur inside the United States. [FAR 27.201-1\(b\)\(2\)](#); [FAR 27.201-2\(b\)\(2\)](#).
1. With this clause in the contract, the contractor is authorized to use any invention covered by a U.S. patent. [FAR 52.227-1\(a\)](#).
 2. As discussed above, the patent owner’s only remedy is to file a claim or lawsuit against the Government to be reasonably compensated for the infringement.
 3. If the patent owner is unaware the contractor was working on a Government contract and files a lawsuit against the contractor itself, the FAR requires the contractor to provide notice of this suit to the Government so the Government can obtain a dismissal. [FAR 27.202-1](#); [FAR 52.227-2](#).
- E. Indemnification and Waiver. The fact that the Government authorizes a contractor to use a third-party’s invention, does not settle the issue whether the contractor or the Government is ultimately liable for any compensation the Government pays that third-party.
1. The “Authorization and Consent” clause only permits – it does not require – the contractor to make use of the invention. As a result, the contractor may have to indemnify the Government for any compensation paid to the patent owner. [FAR 27.203](#); [FAR 52.227-3](#); [FAR 52.227-4](#).
 2. Pre-award, the Government may decide to waive indemnification. [FAR 27.203-6](#); [FAR 52.227-5](#). If the contract involves research and development, the waiver is automatic. [FAR 27.203-1\(b\)\(1\)](#).

VI. TECHNICAL DATA RIGHTS.

- A. References.

1. [10 U.S.C. §§ 2302\(4\), 2305\(d\)\(4\), 2320, 2321, and 2325.](#)
 2. [FAR Subpart 27.4.](#)
 3. [DFARS Subpart 227.71.](#)
- B. Purpose. [FAR 27.402](#); [DFARS 227.7102-1](#); [DFARS 227.7103-1](#).
1. Maintenance and repair from other than the original manufacturer.
 2. Competitive repurchase.
- C. Background.
1. Technical Data is not a separate area of intellectual property. It is basically a combination of trade secret law and copyright law.
 2. There are actually two separate technical data regimes: one for DOD and one for all other agencies. [FAR 27.400](#).
 3. Prior to World War II, there was no standing military so there was also no need to maintain, repair, and replace large quantities of equipment. First technical data regulation was issued in 1955 and provided Government with complete access to data. This was unacceptable to many contractors so they refused to do work for the Government.
 4. Current system was established in 1984 as part of the drastic overhaul that Congress made to the government contracts process in the Competition in Contracts Act and the Defense Procurement Reform Act. Pub. L. No. 98-369, 98 Stat. 1175 and Pub. L. No. 98-525, 98 Stat. 2588 (both codified as amended in scattered sections of 10 U.S.C. and 41 U.S.C.). Congress believed a lack of technical data forced the Government to repurchase on a sole-source basis with the original manufacturer thus causing inflated prices (e.g., \$500 toilet seat).

D. Definition of Technical Data. The term “technical data” means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to supplies procured by an agency. Such term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. [10 U.S.C. § 2302\(4\)](#); [FAR 27.401](#); [DFARS 252.227-7013\(a\)\(14\)](#); [DFARS 252.227-7015\(a\)\(4\)](#).

E. Government Rights in Technical Data.

1. Unlimited Rights.

- a. The Government obtains “unlimited rights” if the data pertains to an item or process developed exclusively with Government funding. [10 U.S.C. § 2320\(a\)\(2\)\(A\)](#); [DFARS 227.7103-5\(a\)](#); [DFARS 252.227-7013\(b\)\(1\)](#).
- b. Unlimited Rights means the government may “use, modify, reproduce, perform, display, release, or disclose” the data to anyone and for any purpose. [10 U.S.C. § 2320\(a\)\(2\)\(A\)](#); [DFARS 252.227-7013\(a\)\(15\)](#).
- c. Unlimited rights destroy the ability to protect the data as a trade secret. See Part [III.B.6](#) above in this outline.

2. Limited Rights.

- a. The Government obtains “limited rights” if the data pertains to an item or process developed exclusively with private funding. [10 U.S.C. § 2320\(a\)\(2\)\(B\)](#); [DFARS 227.7103-5\(c\)](#); [DFARS 252.227-7013\(b\)\(3\)](#).
- b. Limited Rights means the government may “use, modify, reproduce, perform, display, release, or disclose” the data only within the Government except that the Government may release to another if “necessary for emergency repair and overhaul.” [10 U.S.C. § 2320\(a\)\(2\)\(B\) and \(D\)](#); [DFARS 252.227-7013\(a\)\(13\)](#).

- c. The contractor has the ability to retain trade secret status since the Government (and anyone the Government subsequently furnishes the information to) has an obligation to keep the data confidential. See [DFARS 252.227-7013\(b\)\(2\)\(iii\)](#) and [DFARS 252.227-7013\(b\)\(3\)\(ii\)](#).
 - 3. Government Purpose Rights.
 - a. The Government obtains “government purpose rights” if the data pertains to an item or process with both Government and private funding. [10 U.S.C. § 2320\(a\)\(2\)\(E\)](#); [DFARS 227.7103-5\(b\)](#); [DFARS 252.227-7013\(b\)\(2\)](#).
 - b. Government Purpose Rights means the government may “use, modify, reproduce, perform, display, release, or disclose” the data within the Government or may release or disclose such data to someone outside the Government so long as the recipient uses the data for Government purposes. [DFARS 252.227-7013\(a\)\(11\)](#).
 - c. After the passage of a set period of time (the default set in the DFARS is five years but this is negotiable), the Government’s rights become unlimited. [10 U.S.C. § 2320\(c\)](#); [DFARS 227.7103-5\(b\)](#); [DFARS 252.227-7013\(b\)\(2\)](#).
 - 4. Negotiated Rights. The Government and the contractor may modify these pre-determined levels of rights so long as the Government receives no less than limited rights in the data. [10 U.S.C. § 2320\(a\)\(2\) and \(c\)](#); [DFARS 227.7103-5\(d\)](#); [DFARS 252.227-7013\(b\)\(4\)](#).
 - 5. The Government never receives ownership of the data – just a license to use the data. [DFARS 227.7103-4\(a\)](#).
- F. Funding Source Determination – Defining “developed at.”
- 1. Independent research and development costs and bid & proposal costs are not considered Government funds. [10 U.S.C. § 2320\(a\)\(3\)](#); [DFARS 252.227-7013\(a\)\(7\) and \(9\)](#).

2. The “funding test” does not look at who provided funding for the data; it looks at funding of the item or process to which the data relates (e.g., tank versus tank repair manual).
3. Determination is made at the lowest level possible. Contractor can assert limited rights in a “segregable sub-item, subcomponent, or portion of a process.” [DFARS 227.7103-4\(b\)](#); [DFARS 252.227-7013\(a\)\(7\)\(i\)](#).
4. What constitutes developed? DFARS basically adopts a “reduction to practice or conception” test. [DFARS 252.227-7013\(a\)\(6\)](#).

G. How is Protection Obtained?

1. The Government receives unlimited rights in data unless the contractor takes affirmative steps to limit such rights. [DFARS 227.7103-5\(a\)\(7\)](#); [DFARS 227.7103-10\(c\)\(1\)](#); [DFARS 252.227-7013\(b\)\(1\)\(vii\)](#).
2. Data List.
 - a. In its offer, a contractor must develop a listing of all data that it will submit to the Government and in which the Government will not receive unlimited rights. [DFARS 227.7103-3\(b\)](#); [DFARS 227.7103-10\(a\)\(1\)](#); [DFARS 227.7104\(e\)\(2\)](#); [DFARS 227.7203-3\(a\)](#); [DFARS 252.227-7017\(c\)](#).
 - b. This listing is included in the awardee’s contract. [DFARS 227.7103-10\(a\)\(3\)](#).
 - c. The contractor must deliver any data not included on this listing with unlimited rights unless it obtains the Government’s permission to add the data to this listing. [DFARS 227.7103-3\(c\)](#); [DFARS 252.227-7013\(e\)\(2\) and \(3\)](#).
 - d. Problem area: modifications to contracts. See General Atronics, Corp., ASBCA No. 49196, 02-1 BCA ¶31,798.

3. Data Marking.

- a. When the contractor delivers data to the Government, it must mark each piece of data on which it asserts restrictions with a marking or legend indicating the level of rights it believes the Government should have in the data. [DFARS 252.227-7013\(f\)](#).
- b. This marking is placed on the transmittal sheet and each page of the printed material containing the technical data for which the contractor is asserting restrictions. [DFARS 252.227-7013\(f\)\(1\)](#).
- c. The DFARS prescribes the “legends” or markings that must be used. [DFARS 252.227-7013\(f\)\(2\) – \(4\)](#).
- d. Unmarked data.
 - (1) If the contractor mistakenly delivers unmarked data, it can request to have the data subsequently marked so long as the request is made within six months after the data was submitted or any extension of time granted by the contracting officer. [DFARS 227.7103-10\(c\)\(2\)](#).
 - (2) While such request is pending the Government may not release the data until the matter is resolved. [DFARS 227.7103-10\(c\)\(1\)](#).
 - (3) If the request is made after the data has already been released, nothing can be done to correct the omission if the recipient had no restrictions on usage of the data. [DFARS 227.7103-10\(c\)\(3\)](#).
- e. If the contractor delivers data with a marking not corresponding to those specified in the DFARS, the Government must notify the contractor of this non-conformity. [DFARS 252.227-7013\(h\)\(2\)](#). If the contractor fails to correct this non-conformity within 60 days, the DFARS permits the Government to remove or ignore the marking. [DFARS 227.7103-12](#). NOTE: consult with competent legal counsel prior to release.

4. Government Challenge of Asserted Restrictions. [10 U.S.C. § 2321](#). Any contract that entails delivery of technical data will include the “Validation of Restricted Marking on Technical Data” clause. [DFARS 227.7103-13](#); [DFARS 252.227-7037](#).
 - a. The contractor is required to set up and maintain a system of records that can validate and justify the restrictive markings it places on its data. [10 U.S.C. § 2321\(b\)](#); [DFARS 227.7103-11](#); [DFARS 252.227-7037\(c\)](#).
 - b. If the KO disagrees with the asserted restrictions, she sends a written notice to the contractor providing the basis for challenging the restriction and notifies the contractor that it has 60 days to respond. [10 U.S.C. § 2321\(d\)\(3\)](#); [DFARS 227.7103-13\(c\)](#); [DFARS 252.227-7037\(e\)\(1\)](#).
 - c. The challenge may occur as late as three years after contract completion. [10 U.S.C. § 2321\(d\)\(2\)\(B\)](#); [DFARS 227.7103-13\(c\)\(1\)](#); [DFARS 252.227-7037\(i\)](#).
 - d. The contractor’s response to the challenge is considered a claim under the Contract Disputes Act and must be certified regardless of the amount at issue. [10 U.S.C. § 2321\(h\)](#); [DFARS 252.227-7037\(e\)\(3\)](#).
 - e. If the contractor fails to respond or responds but does not justify the asserted restrictions, the KO issues a final decision indicating his determination that the Government has unlimited rights in the data. However, the Government must abide by the asserted restrictions for 90 days after issuance of the final decision (giving the contractor time to file suit). [DFARS 252.227-7037\(g\)\(2\)](#).
- H. Subcontractor Technical Data. As with patents, the Government does not want the contractor to be able to use its leverage to obtain subcontractor technical data. The contractor is therefore able to submit its technical data directly to the Government. [10 U.S.C. § 2320\(a\)\(1\)](#); [DFARS 227.7103-15](#); [DFARS 252.227-7013\(k\)\(3\) and \(4\)](#).

I. Deferred Delivery and Ordering of Data.

1. Deferred Delivery. Several versions of an item or process may be developed before the Government ultimately finalizes the item for production and fielding. We do not want or need data related to each iteration (logistical nightmare). Under these circumstances, the Government may defer delivery of data for up to two years after contract termination if it includes a special clause in the contract. [DFARS 227.7103-8\(a\)](#); [DFARS 252.227-7026](#).
2. Deferred Ordering. Alternatively, the Government may not know at contract award whether it will need data. Again, the Government may include a special clause in the contract to permit it to order data, this time up to three years after contract termination. [DFARS 227.7103-8\(b\)](#); [DFARS 252.227-7027](#).

J. Non-Conforming Data and Data Warranty.

1. If the contractor does not deliver the contractually required technical data, the Government may withhold payment. [10 U.S.C. § 2320\(b\)\(8\) and \(9\)](#); [DFARS 227.7103-14\(b\)](#); [DFARS 252.227-7030](#). The amount withheld is set at 10% but may be adjusted based upon the relative value and importance of the data. [DFARS 227.7103-14\(b\)\(2\)](#).
2. When the contractor submits data to the Government, the data must be complete and accurate and satisfy the contractual requirements. [10 U.S.C. § 2320\(b\)\(7\)](#); [DFARS 227.7103-14\(a\)\(1\)](#); [DFARS 227.7103-6\(e\)](#); [DFARS 227.7104\(e\)\(5\)](#); [DFARS 252.227-7036](#). The DFARS no longer requires written assurance of completeness/accuracy. See DFARS subpt. 227.71.
3. If the contractor submits defective data to the Government which is accepted by the Government, the Government would only have a remedy if it obtained a warranty on the data from the contractor. [10 U.S.C. § 2320\(b\)\(8\)](#); [DFARS 227.7103-14\(c\)](#); [DFARS 246.710](#); [DFARS 252.246-7001](#).

K. Release of Data.

1. If the Government has unlimited rights in the data, the Government may release the data to anyone without restriction. [10 U.S.C. § 2320\(a\)\(2\)\(A\)](#); [DFARS 252.227-7013\(a\)\(15\)](#). See Part [VI.E.1](#) above in this outline.
2. If the Government has some other level of rights in the data, it will be able to release to others in the Government and possibly to non-governmental personnel (see Part [VI.E](#) above in this outline).
 - a. Unless the recipient is being provided the data under another contract with the Government, it will have to sign a “Use and Non-Disclosure Agreement.” [10 U.S.C. § 2320\(a\)\(2\)\(D\)\(ii\)](#); [DFARS 227.7103-7\(a\)](#).
 - b. If the recipient is being provided the data under another contract with the Government, that contract should have [DFARS 252.227-7025](#) in it which requires the contractor to have its employees sign a “Use and Non-Disclosure Agreement” prior to giving them restricted data. [DFARS 227.7103\(b\)](#).
 - c. In either case, the Government will also have to notify the data owner of the release. [10 U.S.C. § 2320\(a\)\(2\)\(D\)\(iii\)](#); [DFARS 252.227-7013\(a\)\(13\)\(iv\)](#).

L. Foreign Contracts. If the contract is with a Canadian firm, use the same technical data clauses as is required for American firms. [DFARS 227.7103-17\(c\)](#). If the contract is with a firm from any other country, the Government may use a special clause giving the Government unlimited rights regardless of the funding source. [DFARS 227.7103-17\(a\)](#).

M. Distinctions for Commercial Items.

1. Government Challenge of Markings. There is a presumption that commercial items are developed exclusively at private expense. [10 U.S.C. § 2320\(b\)\(1\)](#); [10 U.S.C. § 2321\(f\)](#); [DFARS 252.227-7037\(b\)](#). The Government should therefore not challenge the contractor’s asserted markings unless the Government can demonstrate it contributed financially towards the development of the item. [DFARS 227.7102](#).

2. Deferred Delivery and Ordering of Data. There are no clauses permitting deferred ordering / delivery of data related to commercial items so the Government must identify its needs up-front.
3. Non-Conforming Data and Data Warranty. There is no provision requiring the contractor to furnish written assurance that the data is accurate and complete, authorizing the Government to obtain a data warranty, or permitting withholding of payment if the contractor submits non-conforming data. But see [10 U.S.C. § 2320\(b\)\(7\) – \(9\)](#).
4. Subcontractor Data. There is no requirement to permit subcontractors to deliver their data directly to the Government.
5. Release of Data. Under certain circumstances, the Government may release data to third parties. [DFARS 227.7102-2\(a\)](#) and [DFARS 252.227-7015\(b\)](#). There is no specified agreement that the third-party must sign, however. Consult competent legal authority!

N. Bid and Proposal Data.

1. Offerors/Bidders may want to or may be required to furnish technical data to demonstrate their expertise.
2. Pre-Award Protections. Prior to award of a contract, Section 27 of the Office of Federal Procurement Policy Act protects bid and proposal data. [41 U.S.C. § 423](#). See also [FAR 52.215-1\(e\)](#) and [DFARS 252.227-7016](#).
3. Post-Award Protections. The Government will only have rights in the awardee's data and will only have that level of rights that it negotiates into the resultant contract. [FAR 52.215-1\(e\)](#); [DFARS 252.227-7016\(c\)](#).
4. Unsolicited Proposals. Data submitted as part of an unsolicited proposal is protected by [FAR 15.609](#).

O. Copyright Law Impacts.

1. The DFARS requires technical data submitters to grant the Government the right to “reproduce data, distribute copies of the data, publicly perform or display the data, or . . . modify the data to prepare derivative works.” [DFARS 227.7103-9\(a\)](#).
2. The DFARS also requires any data submitter who has incorporated a third-party’s work into its own technical data to obtain a copyright license from that third-party prior to submitting the data to the Government. [DFARS 227.7103-9\(a\)\(2\)](#).
3. Contracts for the acquisition of existing works. These are works not first created under a Government contract. The Government must therefore obtain a license in the work in order to display it or reproduce it. [DFARS 227.7105-1](#); [DFARS 252.227-7021](#).
4. Contracts for the acquisition of special works. [DFARS 227.7106](#). This provision concerns works created under contract such as books, computer databases, etc. where the government wishes to control the distribution of the item or obtains an assignment of copyright from the contractor. [DFARS 252.227-7020](#).
5. Construction contracts. [DFARS 227.7107-1](#).
 - a. If the Government hires an architect-engineer who develops a unique design that the Government does not want to be duplicated, the Government will have to acquire ownership of the drawings and related data. [DFARS 227.7107-1\(b\)](#); [DFARS 252.227-7023](#).
 - b. If the Government hires an architect-engineer and it does not care whether the design gets replicated, the Government obtains unlimited rights in the drawings. [DFARS 227.7107-1\(a\)](#); [DFARS 252.227-7022](#).
 - c. Similarly, if the construction contractor develops shop drawings, the Government obtains unlimited rights in those drawings permitting it to freely reproduce and distribute them. [DFARS 227.7107-1\(c\)](#); [DFARS 252.227-7033](#).

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NONAPPROPRIATED FUND CONTRACTING

I. INTRODUCTION.

II. REFERENCES.

- A. 10 U.S.C. § 3013(b)(9). Provides Secretary of the Army the authority to administer the MWR program.
- B. 10 U.S.C. § 2783. Requires the Secretary of Defense to prescribe regulations governing NAF funds and sets out punishments for violating those regulations.
- C. DOD Directive 4105.67, Nonappropriated Fund (NAF) Procurement Policy (2 May 2001) [hereinafter DOD Dir. 4105.67].
- D. DOD Instruction 4105.71, Nonappropriated Fund (NAF) Procurement Procedure (26 February 2001, with Change 1, administratively reissued 30 July 2002) [hereinafter DOD Instr. 4105.71].
- E. Army Regulations.
 - 1. AR 215-4, Nonappropriated Fund Contracting (11 March 2005); AR 215-1, Morale, Welfare, and Recreation Activities and Nonappropriated Fund Instrumentalities (24 October 2006); AR 215-7, Civilian Nonappropriated Funds and Morale, Welfare, and Recreation Activities (26 January 2001).
 - 2. AR 415-15, Army Military Construction and Nonappropriated-Funded Construction Program Development and Execution (12 June 2006), and AR 420-10, Management of Installation Directorates of Public Works (15 April 1997) govern Army construction contracting, including some NAF construction contract issues.

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157th Contract Attorneys' Course
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III. DEFINITIONS AND STATUTORY CONTROLS.

- A. Nonappropriated Fund Instrumentality (NAFI). AR 215-4, Consolidated Glossary, Sec. II, Terms.

An integral DOD organizational entity that performs an essential Government function. It acts in its own name to provide or assist other DOD organizations providing morale, welfare, and recreational programs for military personnel and civilians. It is established and maintained individually or jointly by the heads of the DOD components. As a fiscal entity, it maintains custody and control over its nonappropriated funds. It is responsible for the prudent administration, safeguarding, preservation, and maintenance of those appropriated fund resources made available to carry out its function. With its nonappropriated funds, the NAFI contributes to the morale, welfare, and recreation programs of other authorized organizational entities when so authorized. It is not incorporated under the laws of any State or the District of Columbia and enjoys the legal status of an instrumentality of the United States.

- B. Nonappropriated Funds (NAFs). AR 215-4, Consolidated Glossary, sec. II, Terms.

Cash and other assets received by NAFIs from sources other than monies appropriated by the Congress NAFs are government funds used for the collective benefit of those who generate them: military personnel, their dependents, and authorized civilians. These funds are separate and apart from funds that are recorded in the books of the Treasurer of the United States.

- C. Statutory Controls on Funds. Congress directed DOD to issue regulations governing the management and use of NAFs, and has made DOD personnel subject to penalties for their misuse. All NAFIs are created by DOD and its components, and all NAFs are government funds. However, NAFs are not appropriated by Congress or controlled by the Treasury Department. NAFIs, as fiscal entities, control their NAFs. 10 U.S.C. § 2783. See Appendix A to this outline. Nevertheless, Congress may control the use of NAFs. For example:

1. Purchase of Alcoholic Beverages. A NAFI in the United States may purchase beer and wine only from in-State sources. 10 U.S.C. § 2488. See AR 215-1, para. 7-12b; AR 215-4, para. 10-6c. Cf. AR 215-1, para.10-12a (Installation Management Agency (IMA) Regions set the policy governing the source of alcoholic beverages outside the United States).
2. Pricing of Wine. NAFIs located on military installations outside the United States must price and distribute wines produced in the United States equitably when compared with wines produced by the host nation. 10 U.S.C. § 2489. See AR 215-1, para.10-13.

IV. RESPONSIBILITIES.

- A. Family and MWR Command (FMWRC) (formerly United States Army Community and Family Support Center or USACFSC). The FMWRC is a supporting command of the Installation Management Command. The Commanding General (CG), USACFSC, is responsible for implementing policies and procedures for Army NAF acquisitions. Responsibilities include management and oversight of all USACFSC contracting elements, which include the Armed Forces Recreation Centers (AFRCs) and the Army Recreation Machine Program (ARMP), without power of delegation.
- B. AFRC and ARMP General Managers. Responsible for managing their contracting activities and for recommending, to the CS, USACFSC, individuals for NAF contracting warrants.
- C. Installation Management Command (IMCOM) (formerly Installation Management Agency or IMA). The IMCOM will be commanded by a lieutenant general, who is also the assistant chief of staff for installation management, with the dual role as the Army's single authority and primary provider of base support services while also being responsible for providing effective garrison support of mission activities.

- D. IMA Regional Directors.¹ Responsible for management and oversight of NAF contracting activities under their command, including training their NAF contracting officers.
- E. Garrison Commanders. Manage garrison NAF contracting activities, report to affiliated IMA regional directors, and recommend to the IMA regional director garrison NAF personnel for appointment as NAF contracting officers.
- F. United States Military Entrance Processing Command (USMEPCOM). Commander is approving authority for Army NAF acquisitions and issuance of Army NAF contracting warrants within USMEPCOM.

V. AUTHORITY TO CONTRACT.

- A. Generally. Only warranted contracting officers are authorized to execute, administer, and terminate NAF contracts. The authority of these contracting officers is limited by their warrant. An exception exists in for emergency situations. (See subparagraph V. B.1(f) below).
- B. Contracting Officers and Related Personnel.
 - 1. Army Rules. Four types of contracting officers support Army NAFIs.² AR 215-4, paras. 1-6 through 1-9, 3-11, and 3-12. Additional personnel may also directly complete or assist with NAF purchases. These include:

¹ There are currently seven IMA regions. - IMA Northeast (Fort Monroe, VA); IMA Southeast (Fort McPherson, GA); IMA Northwest (Rock Island Arsenal, IL); IMA Southwest (Fort Sam Houston, TX); IMA Pacific (Fort Shafter, HI); IMA Europe (Heidelberg); and IMA Korea (Seoul). The four CONUS regions will be consolidated into two regions in Fort Eustis, VA and Fort Sam Houston, TX.

² Under previous regulatory guidance, the various types of NAF contracting officers had differing limitations on their authority to contract beyond their warrant limitations (see previous version of AR 215-4, 10 September 1990, paras. 1-6h and Appx B). These limitations were removed in the new version of the regulation and limits are now left up to the CG, USACFSC and the individual IMA regional directors for their organizations.

- a. Garrison (installation) NAF contracting officers. IMA is currently working towards centralizing all contracting actions at the regional headquarters. However, many installations still have their own NAF contracting officers. Many installations also have NAF liaisons who do not possess warrants.
- b. IMA regional contracting officers.
- c. NAF contracting officer, USACFSC.
 - (1) Contracting officers assigned to the USACFSC contracting office may solicit, award, and administer supply and service contracts that exceed the limitations placed on the installation NAF contracting officer.
 - (2) Installations purchasing items that exceed the warrant of the installation NAF contracting officer must forward purchase requests to or through their IMA region to the USACFSC Contracting Division for action. AR 215-4, para. 1-17.
- d. Appropriated fund (APF) contracting officers.
 - (1) An APF contracting officer may manage a NAF acquisition for supplies and services if the contract value is expected to exceed the NAF contracting officer's warrant, or a complex contract action is anticipated (regardless of dollar amount) that is beyond the NAF contracting officer's expertise. AR 215-4, paras. 1-17.
 - (2) An APF contracting officer must adhere to NAF policies and procedures when procuring supplies or services on behalf of a NAFL.

- (3) Procurements combining APFs and NAFs will normally be accomplished by an APF contracting officer. One exception is MWR utilization, support, and accountability funding (MWRUSA). AR 215-5, para. 1-18 and AR 215-1.
- e. A warranted contracting officer may appoint some, or all, of the following:
 - (1) Ordering Officers. Must be appointed in writing by a warranted contracting officer. Can place delivery orders against indefinite delivery type contracts, up to \$25,000, providing the ID/IQ contract terms permit such orders. AR 215-4, para. 1-17, 6-7.
 - (2) Blanket Purchase Agreement (BPA) Callers. Must be appointed in writing by warranted contracting officer.
 - (a) Call authority up to simplified acquisition threshold (currently \$100,000) if caller is in contracting office.
 - (b) Limited to competition threshold (currently \$5,000) if caller outside a NAF contracting office.
 - (3) Administrative Contracting Officers (ACO). Appointed in writing by warranted contracting officer to handle certain delineated aspects of contract management.
 - (4) Contracting Officer's Representatives (COR). Appointed in writing by a warranted contracting officer and serves as liaison between the contractor and the contracting officer. Responsible for the technical and administrative monitoring of the contract. No authority to change the terms or conditions of the contract.
- f. Emergency purchases – No warrant requirement.

- (1) When unforeseeable events occur that are likely to cause a loss of NAFI property, assets, or revenues if immediate action is not taken, unwarranted individuals may incur obligations on behalf of a NAFI. AR 215-4, para. 2-24.
 - (2) IMA Regional NAF contracting officers must train personnel in emergency contracting procedures and maintain list individuals authorized to make such purposes.³
2. Appointment. AR 215-4, paras. 1-8, and 1-15.
 - a. The CG, USACFSC, approves and issues warrants for all USACFSC contracting elements.
 - b. The IMA regional director is authorized, without the power of delegation, to issue and terminate NAF contracting officer warrants for personnel assigned to the regional NAF contracting office.
 - c. The garrison commander is authorized, without the power of delegation, to issue and terminate NAF contracting officer warrants for personnel assigned to the installation NAF contracting office.
3. Limitations on warrants (AR 215-4, para. 1-15).
 - a. Only CG, FMWRC, can issue warrants exceeding \$250,000.
 - b. IMA regional directors and garrison commanders may issue warrants to their personnel up to \$250,000 (unlimited for delivery orders placed against existing contracts).

³ Under previous version of AR 215-4, the chief of the NAF contracting office appointed individuals to make purchases totaling \$2,500 or less after normal duty hours.

- c. IMA regional directors and garrison commanders wishing to issue warrants exceeding \$100,000 (but still less than \$250,000) must first get approval from the CG, USACFSC.
 - d. Appointing official should consider the complexity and dollar value of the acquisitions to be assigned, as well as the contracting specialists experience, training, education, business judgment, and reputation before selecting contracting officers.
4. Ratification actions. AR 215-4, para. 1-21. Act of approving, by a person authorized to do so, an unauthorized commitment. Authorities and circumstances for use set out in regulation.

VI. APPROVAL AND COORDINATION. AR 215-4, para. 1-12 and Appendix B.

A. Initiating the Process.

- 1. Forms. Army NAF Purchase Request (DA Form 4065-R).
- 2. The requesting activity begins the NAF acquisition process by submitting to the contracting officer a computer generated request in the Standard NAF Automated Contracting System (SNACS) showing funds are available and the activity has obtained the required approvals.
- 3. Contracting. Approval authority for NAF contracting, to include any dollar thresholds, is delegated to individual IMA regional directors (typically, for example, purchases over \$25,000 must be approved by the garrison commander or IMA regional director).

B. Additional Requirements for Construction Projects. AR 215-1, ch. 10, Section II.

- 1. NAFIs must coordinate with the servicing Director of Public Works (DPW) concerning all maintenance, repair, and construction of real property facilities used to support morale, welfare, and recreation (MWR) activities. All existing and planned MWR facilities are included in the installation master plan. AR 215-1, para. 15-4a.

2. United States Army Corps of Engineers (USACE) Architectural and Engineering Instructions (AEI) provide initial project planning. NAF construction must conform to applicable commercial building codes as appropriate. AR 215-1, para. 15-4f.
3. Funding approval limitations for MWR construction projects are set forth in AR 215-1, paras. 15-4 through 15-7, and the corresponding Army regulations governing construction. See AR 415-19 for projects financed wholly by NAFs.
4. There are limitations on combining APFs with NAFs and/or private funds in a single construction project. Before combining funds, the contracting officer must obtain prior written approval as follows:
 - a. The IMA Regional Director for construction projects costing up to \$750,000. AR 215-1, para. 15-3a. See also, AR 415-19, para. 2.1b, for additional requirements.
 - b. The Facilities and Housing Directorate (DAIM-FDR, OACSIM) for construction projects costing between \$750,000 and \$1.5 million. AR 215-1, para. 15-3b.
 - c. The Office of the Deputy Assistant Secretary of the Army (Installations and Housing) for construction projects costing more than \$1.5 million. AR 215-1, para. 15-3c.
 - d. All NAF construction projects \$750,000 or more must have a commercial Project Validation Assessment (PVA) which is contracted for and funded by the USACFSC. AR 215-1, 15-4e.
5. Construction Program funding. AR 215-1, para. 15-5.
 - a. Authorized Construction funding sources (APF and NAF) for military MWR facilities are set out in AR 215-1, Appendix E.
 - b. APF construction projects costing \$750,000 or more are funded with MILCON. Projects under \$750,000 are funded with installation O&M.

- c. NAF construction programs.
 - (1) NAF Major construction (NAFMC). Real property construction projects with construction costs of \$750,000 or more and community facility construction projects listed in AR 215-1, Appendix E.
 - (2) Capital Purchases and Minor Construction (CPMC) for any project under \$750,000 and capitalized per DOD 7000.14, vol. 13 (DOD Financial Management Regulation).

VII. ACQUISITION PLANNING AND DEVELOPMENT.

- A. Purpose. Obtain the best value for its supplies, services, and construction requirements.
- B. Requiring Activity. Requiring activity prepares a statement of work (SOW), justifies a sole-source or brand-name purchase where requested, and submits purchase request with necessary approvals and certification of funds availability.
- C. Contracting Office. Provides advice to requiring activity, maintains source lists, determines appropriate acquisition process, awards contracts, appoints ACOs and CORs as necessary, and administers contracts.
- D. Acquisition Planning Team / Acquisition Plans. Required for all acquisitions over \$100,000 (unless commercial items), including option years.
- E. Bulk Funding. System establishes a reserve of funds to be used for an approved purpose over an identified period of time (like a prepaid credit card). Enables contracting officers to purchase ongoing requirements more efficiently. Bulk funding should be used whenever practicable.
- F. Contracting Methods. AR 215-4, para. 2-5. (see also Acquisition Methods, para IX, below).

1. Simplified Acquisitions. AR 215-4, Chapter 3. Where the purchase of supplies and services, including construction, is not complex and does not exceed the simplified acquisition threshold (currently \$100,000), or for commercial items at \$250,000 or less.
 - a. Can be accomplished by oral quotations, or by a written paper or electronic solicitation to prospective offerors, if evaluating price alone.
 - b. Other simplified acquisition techniques such as BPAs, purchase cards, delivery or task orders can also be used.
2. Sealed Bidding. AR 215-4, Chapter 5.
3. Negotiations. AR 215-4, Chapter 4.

G. Types of Contracts. AR 215-4, para. 2-8.

1. Purchase Orders. Most commonly used to acquire simple supplies and services.
2. Firm-fixed price (FFP) contracts are the preferred contract type for most NAF procurements. Least risk to the NAFI. DOD Dir. 4105.67, para. 4.6.
3. FFP with economic price adjustments. Allows price fluctuation based on specified contingencies.
4. Indefinite delivery contracts. Permissible. Includes requirements contracts, indefinite quantity, and definite quantity contracts.
5. Cost-plus-percentage-of-cost contracts are prohibited.

H. Types of Agreements. AR 215-4, para. 2-9.

1. Basic ordering agreements. A written agreement between the NAFI and a contractor containing terms and conditions that will apply to future, potential orders, pricing, a description of supplies or services to be provided, and the method for issuing orders under the agreement.
 2. Blanket purchase agreements. A simplified method of procurement for filling anticipated, repetitive needs for goods or services. Not a contract because no obligation to place orders and no funds obligated until time of ordering. Ordering officer places call orders against BPA when supplies or services are needed.
- I. Length of Contracts. Generally, contracts should not exceed five years, including options without written justification and approval. AR 215-4, para. 2-4. Limitation does not apply to construction contracts with a specified delivery date.

VIII. COMPETITION AND SOURCES OF SUPPLIES AND SERVICES.

- A. Competition. The Competition in Contracting Act (CICA) does not apply to NAFIs unless appropriated funds are obligated. 10 U.S.C. § 2303; Gino Morena Enters., B-224235, Feb. 5, 1987, 87-1 CPD ¶ 121.
1. Although CICA statutory requirements do not apply to NAFI acquisitions involving only NAFs, service regulations require maximum practicable competition. Sole source procurements must be justified. AR 215-4, para. 1-1, 2-12, and 2-13.
 - a. For purchases of \$5,000 or less, NAFIs need not seek competition if the price obtained is fair and reasonable and purchases are distributed equitably among qualified suppliers. AR 215-4, para. 2-12.
 - b. For purchases costing more than \$5,000, NAFIs must compete the acquisitions (except those for commercial entertainment) unless a sole source acquisition is justified. AR 215-4, para. 2-12, 2-13. Competition exists if:
 - (1) the activity solicits at least three responsible offerors; and

- (2) at least two offerors independently submit responsible offers. AR 215-4, para. 2-12.

c. NAFI may, but need not, synopsise acquisitions at fedbizopps.gov.

2. Sole source acquisitions. AR 215-4, para. 2-13.

a. Contracting officers must approve all sole source acquisitions in writing. AR 215-4, para. 2-15.

b. Sole source acquisitions can be based on:

- (1) No other source being able to satisfy the requirement;
- (2) Needed technical data rights are limited by original source;
- (3) Purchase of unique repair or replacement parts to repair existing equipment; or
- (4) Utility services limited by state or local governments.

B. Use of existing contracts and agreements.

- 1. Government sources of supply for NAFI requirements include the General Services Administration (GSA), Defense Supply Depots, and commissaries. AR 215-4, para. 4-1.
- 2. Other NAF sources include, but are not limited to, the Army and Air Force Exchange Service (AAFES), the Navy Resale System Office, and the Marine Corps Exchange System. AR 215-4, para. 4-1.
- 3. FAR Subparts 8.6 and 8.7, which require activities to purchase certain supplies from the Federal Prison Industries, Inc. (UNICOR) and the blind or severely disabled, apply to NAF acquisitions. 18 U.S.C. § 4124; 41 U.S.C. §§ 46-48.

4. Competition requirements for approved sources. AR 215-4, para. 2-22.
 - a. Contracts / schedules that were previously awarded competitively, such as GSA multiple award schedules and the ID/IQ consolidated contracts, are considered to have met the competition requirement, thus ordering officers need not obtain further competition or make a fair and reasonable price determination when using these sources. Procedures for using schedules that have not been competitively awarded:
 - (1) Ordering officers can place orders at or below the competition threshold.
 - (2) Orders exceeding the competition threshold (but not exceeding the maximum order threshold) should be placed with the schedule contractor that can provide the best value to the NAFI. At a minimum, at least three sources / schedules must be checked.
5. NAFIs may solicit commercial vendors. Activities may use solicitation mailing lists developed by the NAF contracting office or obtained from the APF contracting office. AR 215-4, para. 2-6.
6. A NAFI may contract with Government employees and military personnel when such contracts are funded solely with NAF. Such contracts shall be nonpersonal service contracts. Examples of these type of contracts include sports officials, arts and crafts instructors, and other MWR activities. Under previous regulations, such contracts were prohibited without installation commander's approval. AR 215-4, para. 1-26.

C. Prohibited Sources.

1. Generally, NAFIs may not solicit or consent to subcontracts with firms or individuals that have been suspended, debarred, or proposed for debarment. AR 215-4, para. 1-25.

- a. Absent termination, the NAFI can continue to place orders against existing contracts.
 - b. Options may be extended only with approval of CG, USACFSC (now FMWRC).
2. Contractors on the “List of Parties Excluded from Federal Procurement and Nonprocurement Programs” as having been declared ineligible on the basis of statute or other regulatory procedure are excluded from receiving contracts or subcontracts. AR 215-4, para. 1-25b. List is available at www.arnet.gov.
 3. Historically, APF activities could not contract with NAFIs unless a sole-source procurement was justified. See Departments of the Army & Air Force, Army & Air Force Exchange Serv., B-235742, Apr. 24, 1990, 90-1 CPD ¶ 410; Obtaining Goods & Servs. from Nonappropriated Fund Activities Through Intra-Dept. Procedures, B-148581, Nov. 21, 1978, 78-2 CPD ¶ 353; AR 215-1, para. 7-34c; AR 60-20, para. 2-7 (forbidding AAFES to bid on APF contracts).
 4. 10 U.S.C. § 2424, however, allows a limited exception for in-stock purchases up to \$100,000 (change from \$50,000) from overseas exchanges.
 5. Additionally, DOD NAFIs may “enter into contracts or other agreements” with other DOD departments, agencies, or instrumentalities “to provide or obtain goods and services beneficial to the efficient management and operation of the exchange system or that morale, welfare, and recreation system.” 10 U.S.C. § 2492; AR 215-1, para. 13-12d. *See* Memorandum from Director for Procurement and Industrial Base Policy, subject: Army Federal Acquisition Regulation Supplement -- 13.90 (30 April 1999) (authorizing use of government credit cards to purchase from the Army and Air Force Exchange Service (AAFES) or other NAFIs). Note, however, that:
 - a. 10 U.S.C. § 2492 does not appear to provide relief from the CICA competition requirements applicable to APF purchases from NAFIs;

- b. There is no statutory definition of “other agreements”; and
- c. There is no indication of the meaning of the requirement that the transaction be beneficial to the NAFI.

IX. ACQUISITION METHODS.

- A. DOD Policy. DOD Dir. 4105.67, para. 4.2, provides that NAFIs shall conduct procurements:

- 1. Primarily through competitive negotiation;
- 2. By trained procurement personnel;
- 3. In a fair, equitable, and impartial manner; and
- 4. To the advantage of the NAFI.

- B. Simplified Acquisitions and Commercial Items. AR 215-4, ch. 3.

- 1. Policy.
 - a. NAFIs shall use Simplified Acquisition procedures to the maximum extent practical for the acquisition of supplies and services, including construction, that do not exceed the simplified acquisition threshold (currently \$100,000). NAFIs may use simplified acquisition procedures for “commercial items” up to \$250,000.
 - (1) Construction is never considered a commercial item.

- (2) Authorized personnel shall make purchases using the simplified acquisition method that is most suitable, efficient, and economical based on the circumstances of each acquisition using any appropriate combination of simplified acquisition procedures and formal acquisition procedures. AR 215-4, para. 3-2e.
- b. Do not split purchases to get under the simplified acquisition threshold.
- c. Contracting officer must also:
 - (1) Promote competition by soliciting at least three sources;
 - (2) Establish reasonable deadlines for submissions;
 - (3) Consider all quotations or offers timely received; and
 - (4) Use innovative simplified acquisition procedures where appropriate and not otherwise prohibited. AR 215-4, para. 3-2f.
- 2. Policy in para. IX.B. above does not apply if NAFI can meet its requirement using –
 - a. Required sources of supply;
 - b. Existing indefinite delivery contracts; or
 - c. Other established contracts.
- 3. When using simplified acquisition procedures, the NAF contracting officer should solicit quotations orally or electronically where appropriate.

4. Construction. Solicitations for construction contracts must be in writing if requirement exceeds \$2,000.
5. Competition.
 - a. The contracting officer shall solicit at least three sources of supplies or services from the sources whose offer may be the most advantageous to the NAFI.
 - (1) If the contracting officer determines that there are fewer than three sources available that can meet the requirement, the contracting officer must document the file with the reasons why additional sources could not be obtained.
 - (2) The contracting officer shall not solicit on a sole source basis unless the provisions of AR 215-4, para. 2-13 and 2-14 apply.
 - (3) When soliciting offers or quotations, the contracting officer must notify potential offerors of the basis upon which award might be made (price alone or price and other factors such as past performance and quality). Solicitations may, but need not, inform potential offerors of relative weights of evaluation factors.
6. Legal effect of quotations. AR 215-4, para. 3-4.
 - a. A quote received in response to a request for quotation (DA form 4067) is not an offer and cannot be accepted by the NAFI to form a binding contract. Issuance by the NAFI of an order for supplies and services also does not form a contract – the order in response to the quote constitutes the offer.
 - b. The order/offer becomes a contract if and when the contractor accepts the order, either in writing or by furnishing the requested supplies, or beginning performance on the requested service.

- c. The NAFI may amend or cancel its order at any time prior to the contractor accepting the order.
- 7. Evaluations of quotes and offers. AR 215-4, para. 3-5
 - a. Generally. The contracting officer will evaluate all offers received by the specified date in an impartial manner, inclusive of transportation costs, against criteria established in the solicitation.
 - b. The contracting officer has broad discretion in developing suitable evaluation procedures.
 - c. Formal evaluation plans, establishing competitive ranges, conducting discussions, and scoring offers are not required, but contracting officers must ensure that offers can be evaluated in affair and efficient manner.
 - d. Evaluation of factors other than price, such as past performance, are not required, but if used, they must be based on information such as the contracting officer's knowledge of and previous experience with the supply or service being requested, customer surveys, or other reasonable bases.
- 8. Award and documentation. AR 215-4, para. 3-7.
 - a. Fair and reasonable price determination must be made before award.
 - b. File documentation should be minimal, but must support contracting officer's process and decisions.
 - c. The contracting officer can request a contractor's written acceptance of a purchase order on a DA Form 4073 if acceptance prior to performance is deemed appropriate by the contracting officer.
- 9. Solicitation and Contract Forms.

- a. Commercial Items. Use DA Form 4066.
 - b. Other than Commercial Items. Use DA Form 4067 unless quotes are solicited orally or electronically.
 - c. Generally, a purchase order is used for simplified acquisitions unless the contracting officer determines that due to risk or other factors, a formal contract, including all of its requisite clauses, is appropriate.
10. Blanket Purchase Agreements (BPA). BPAs provide a simplified method for filling anticipated repetitive needs for supplies and services by establishing “charge accounts” with qualified sources of supply. By establishing a BPA with a vendor, the NAFI eliminates the need for repetitive purchase orders. AR 215-4, paras. 3-11.
- a. Prepared on DA Form 4067-1. Do not cite accounting codes.
 - b. Must include: terms of agreement; a list of authorized BPA callers authorized to make purchases under the BPA; extent of obligations; purchase limits; requirement for delivery tickets; invoicing information.
 - c. Existence of BPA does not justify sole source procurement.
 - d. Review requirements. A sampling of BPAs must be reviewed annually by the contracting officer to ensure proper procedures are being followed. All BPAs exceeding \$100,000 in annual usage must be reviewed annually.
11. Purchase Card Program. Provides method of payment. AR 215-4, para. 3-16.
- a. GSA issues the cards.
 - b. FMWRC coordinates the program, and IMA regions implement operating procedures.

12. Contracting officers may issue task delivery orders for the future delivery of supplies, or the future performance of nonpersonal services against existing contracts. The NAFI must pay the amount stated on the order if the contractor performs. Contract clauses are not used with task or delivery orders because they are already included in the contract against which the orders are placed. AR 215-4, para. 3-17.

C. Negotiated Acquisitions. AR 215-4, ch. 4.

1. Generally.
 - a. Negotiation is a means of contracting using either competitive or noncompetitive proposals and discussions. It is a flexible contracting method that permits contracting personnel to clarify contractual issues related to price, schedule, technical requirements, type of contract, or other terms.
 - b. Negotiation is the preferred method of contracting for supplies and services that NAFIs cannot procure using small purchase procedures.
 - c. Best Value. Contracting officers can obtain “best value” by either a tradeoff process or a low price, technically acceptable process. AR 215-4, para. 4-2.
 - d. Price must be an evaluation factor in every source selection.
 - e. Multiple Awards. Solicitation must inform potential offerors if multiple awards will be considered.
 - f. Solicitation terms and conditions. AR 215-4, para. 4-3.
 - (1) Options. Permissible. The NAFI, not the contractor, exercises options.

- (2) Delivery performance and time. Must be realistic and stated in all contracts.
- (3) Quality assurance. Include appropriate inspection, acceptance, and warranty requirements.
- (4) Liquidated damages. AR 215-4, para. 1-26 and 4-3d. Amount must be reasonable. Consider using only if:
 - (a) The time of delivery or performance is critical; and
 - (b) The exact amount of damage would be difficult or impossible to ascertain or prove if contractor fails to perform; and

2. Negotiation procedures.

- a. Source Selection Authority. The contracting officer is the source selection authority unless the CG, FMWRC, or the IMA MWR regional director formally appoints another individual as the SSA for a particular acquisition or group of acquisitions. AR 215-4, para. 4-4.
- b. Early exchange of information with industry is encouraged. AR 215-4, para.4-5.
- c. Request for proposals (RFP). Instrument by which negotiated acquisitions are initiated.
 - (1) Issued on a DA Form 4069. AR 215-4, para. 4-6.
 - (2) Proposal in response to an RFP is an offer that the government can accept to form a binding contract.
- d. Amending the solicitation.

- (1) Before closing date, issue amendments on DA Form 4073 to all prospective offerors.
 - (2) After closing date for RFP, issue to all offerors who have not been eliminated from the competition.
 - (3) If amendment is so substantial as to alter the playing field and additional sources may be interested, the contracting officer shall cancel the original solicitation and re-solicit, regardless of the stage of the process.
- e. Late proposals and late modifications. AR 215-4, para. 4-11.
- f. Discussions with offerors after receipt. AR 215-4, para. 4-14.
- (1) Clarifications. Limited exchanges used to resolve minor or clerical errors.
 - (2) Discussions. Negotiations that occur after establishment of a competitive range that may, at the contracting officer's discretion, result in an offeror being allowed to revise its proposal.
 - (a) Discussions must be held with each offeror in the competitive range and must be tailored to the individual offeror's proposal.
 - (b) The contracting officer should disclose to offeror the significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, technical approach, past performance, and terms and conditions) that in the contracting officer's opinion could be altered or amended to materially enhance the proposal's potential for award.
 - (c) Primary purpose is to maximize best value to NAFL.

- (d) Award may be made without discussions if the solicitation states that is the NAFT's intent.
- (3) Limitations on discussions.
 - (a) Can not favor one offeror over another.
 - (b) Can not reveal names of other offerors.
 - (c) Can not reveal another offeror's technical solution or any other information that would compromise an offeror's intellectual property.
 - (d) Can not reveal other offerors' prices, but can reveal to an offeror that its price is considered too high or low and reveal the results of analysis supporting that conclusion.
 - (e) Can not reveal the names of individuals providing reference information about an offeror's past performance.
- g. Evaluation of offers. AR 215-4, paras. 4-33 through 4-37.
- h. Contract award. AR 215-4, paras. 4-18 through 4-20.
- i. Protests. AR 215-4, para. 4-21.
 - (1) Interested party is an actual or prospective offeror whose direct economic interest would be affected by the award of, or failure to award, a particular contract.
 - (2) Protests are made to the contracting officer.

- (3) The Government Accountability Office (GAO) generally does not have jurisdiction to hear protests over contracts obligating NAF, although obligation of NAF by APF contracting officers may result in GAO jurisdiction.
 - (4) Protests prior to award. Award should be delayed until the protest is resolved unless contracting officer's supervisor makes a determination that the award should be made in accordance with AR 215-4, para. 4-21c and legal advice is obtained.
 - (5) The contracting officer considers merits of protest and takes appropriate actions which can include rejection of all proposals and the issuance of a new solicitation or using revised evaluation criteria (with corresponding notice to potential offerors and adjusting the due date for proposals).
 - (6) Protests after award. To be considered, a protest must be received within 10 days of notification of award. No requirement to suspend performance, but if compelling reasons dictate, the contracting officer should seek a no-cost suspension with the awardee until the protest can be resolved. If no-cost suspension can not be reached, seek legal counsel.
 - (7) Written decision required with notice of appeal rights to the head of the issuing office (CG, FMWRC, IMA regional director, or garrison commander).
 - (8) Appeals. Appellate authority must seek legal advice before deciding appeal.
- j. Mistakes after award. AR 215-4, para. 4-22. Generally, only correct a mistake if there is a benefit to the NAFI and if modification does not change the essential requirements of the contract.

D. Sealed Bidding. AR 215-4, ch. 4, sec. IV.

1. Sealed bidding is not preferred for NAFI contracting. It may be used only if:
 - a. Price is the only evaluation factor;
 - b. Current and accurate purchase descriptions or specifications have been developed;
 - c. Time permits the solicitation, submission, and evaluation of bids;
 - d. Discussions with bidders are unnecessary; and
 - e. There is a reasonable expectation of receiving more than one sealed bid. See AR 215-4, para. 5-1.
2. Sealed bidding procedures. AR 215-4, paras. 5-2 through 5-23.
 - a. Invitations for bids (IFBs). AR 215-4, para. 5-2.
 - b. Late bids, late bid modifications, and late bid withdrawals. Generally, bidders are responsible for submitting bids, modifications, or withdrawals to the NAF office designated in the IFB by the time specified in the IFB. Bidders may use any method of transmission authorized in the IFB, to include facsimile. If no time is specified, the time for receipt is 4:30 pm. local time for the designated NAFI location on the date the bids are due. AR 215-4, para. 5-12.
 - (1) The government mishandling rule.
 - (2) Late modification of successful bid.
 - c. Amendment and cancellation of bids. AR 215-4, paras. 4-45.5 and 4-45.6.

- d. Mistakes. AR 215-4, paras. 5-16 and 5-18.
- e. Two-step sealed bidding. AR 215-4, para. 5-19 through 5-23.
 - (1) Generally. A combination of competitive procedures designed to obtain benefits of sealed bidding when adequate specifications are not available.
 - (2) Step 1. Requests for technical proposals. Followed by discussions.
 - (3) Step 2. Sealed bids submitted by those who submitted acceptable technical proposals.
 - (4) Use in preference to negotiated procurement if:
 - (a) Available specifications are not definite or complete or may be too restrictive without technical evaluation, and any necessary discussion of the technical aspects of the requirement to ensure mutual understanding between each source and the NAFI;
 - (b) Definite criteria exist for the evaluation of the technical proposals;
 - (c) More than one technically qualified source is expected to be available;
 - (d) Sufficient time is available; and
 - (e) A firm-fixed price or FFP with EPA contract will be used.

- f. Contract award. Award to the lowest responsible, responsive bidder. Only award contracts that are firm-fixed price (FFP) or FFP with economic price adjustment. AR 215-4, para. 5-17.
- g. Protests. AR 215-4, para. 4-21. See para. IX.C.2.i above for discussion.

X. CONTRACT ADMINISTRATION. AR 215-4, ch. 6.

- A. Contract Modifications. Contracting officers acting within the scope of their authority may issue contract modifications using DA Form 4073 electronic formats. AR 215-4, para. 6-2.
- B. Change Orders. NAF contracts generally contain a changes clause that permits the contracting officer to make unilateral changes, in designated areas, within the general scope of the contract. The contractor must continue performance of the contract as changed. The changes clause provides for an equitable adjustment to be made if the contractor experiences an increase or decrease in cost of the work as a result of the change. AR 215-4, para. 6-3.
- C. Constructive Changes. Any conduct by a contracting officer or other authorized representative, other than an ordered change, having the effect of requiring the contractor to perform new work entitles the contractor to relief under the changes clause. Examples include: requiring a contractor to meet a delivery schedule despite an excusable delay; NAFI furnishing defective specs or misinterpreting the contract; or overzealous inspection.
- D. Contracting Officers Representative (COR) / Administrative Contracting Officers (ACO) / Ordering Officers. AR 215-4, paras. 6-5 through 6-7.
 - 1. A COR may be appointed by the contracting officer in writing. Terms and limitations of COR must be set out in appointment memo. However, COR may not issue, authorize, agree to, or sign any contract or modification or in any way obligate the payment of funds by the NAFI.

2. Administrative Contracting Officers (ACO). The contracting officer shall appoint ACOs in writing. ACOs must be warranted contracting officers in their own right.
3. Ordering Officers. Ordering officers appointed in writing by the CO can place delivery orders against indefinite delivery type contracts awarded by the contracting officer. The ordering officer will be under the technical supervision and review of the contracting officer.

E. Performance Delay.

1. Excusable delay for causes beyond the contractor's control should be handled by a bilateral contract modification extending contract performance or terminating the contract for convenience.
2. Inexcusable delays have a variety of remedies from termination to bilateral modification and downward price adjustment.

F. Suspension of Work and Stop-Work. AR 215-4, para. 6-9.

1. The contracting officer may order a suspension of work for a reasonable period of time in a construction contract where appropriate.
2. The contracting officer may give a stop work order in either a service or supply contract where appropriate. Work stoppage may be required for state-of-the-art breakthroughs in technology or program realignment, or construction contract where appropriate.
3. The contracting officer must include a suspension of work clause in all fixed price construction or architect engineer contracts.
4. The contracting officer may include a stop-work order clause in solicitations and contracts for supplies and services.

G. Terminations. AR 215-4, para. 6-10.

1. The terminations clause authorizes contracting officers to terminate contracts when it is in the NAFI's best interest. Terminations can be for convenience or default. Contracting officers can enter settlement agreements.
2. No-fault terminations. For use in concession contracts only, under the no-fault clause (optional), either party can terminate by giving advanced written notice of a predetermined amount of time (usually 30 days).
3. Termination for default.
 - a. Cure notice. Issue if time permits prior to delivery date.
 - b. Show cause notice. Issue if no realistic time for a cure notice or if delivery period has expired.
 - c. Contractor may be liable for excess reprourement costs under a default termination.
4. Contract Disputes and Appeals. AR 215-4, para. 6-11.
 - a. In accordance with the Disputes Clause, the Contracts Disputes Act does not apply to NAFI contracts.
 - b. Prior to final decision, the contracting officer should make every reasonable attempt to settle the dispute amicably. If that fails, the contracting officer issues a final decision.
 - c. Requirements for final decision.
 - (1) Burden rests on the contractor, "to the satisfaction of the contracting officer," on both merits and quantum of claim.
 - (2) Final decision must be in writing. Include relevant facts and basis for the decision.

- (3) Notice that this is a final decision and notice of appeal. See required paragraph language at AR 215-4, para. 6-11c(3).
 - (4) Mail final decision to contractor by certified mail, return receipt requested.
 - d. Processing Appeals with the ASBCA. Contractor will forward notice of appeal, together with envelope showing postmark, to relevant higher headquarters without comment, and to the ASBCA for docketing. A copy of the notice of appeal and the transmittal letter to the ASBCA will be forwarded to the local staff judge advocate.
 - e. Within 30 days of notice of appeal, the contracting officer, with the assistance of legal counsel, will compile five copies of the appeal file (Rule 4 file) and comply with the direction of the trial attorney at the Contract Appeals Division who will coordinate with the ASBCA.
5. Contract Claims. AR 215-4, para. 6-12.
- a. Claims arising out of the operations of the Army installation and regional NAFIs, other than AAFES and the Army Civilian Welfare Funds (ACWF) will be paid out of the IMA Regional Single MWR Fund.
 - b. Claims arising from operations of the ACWF will be settled as directed in AR 215-7.
 - c. Claims arising out of AAFES claims will be settled as directed in AR 60-20.
6. Payment. AR 215-4, para. 6-18.
- a. Advance payments may be provided on any type of contract, but they are the least preferred method of contract financing. They are not authorized if other standard payments (partial, progress, or on-receipt) are available.

- b. Prompt Payment Act. 5 C.F.R. 1315. NAF contracting officers must comply with policies and clauses for implementing Office of Management and Budget (OMB) prompt payment regulations. Include specific prompt payment clause in each applicable solicitation. Refer to FAR, Subpart 32.9 for details.
 - c. Fiscal issues. Because Congress does not appropriate NAF monies, **funds do not expire at the end of the fiscal year.** However, finance offices may close out actions based on fiscal years so contracting officers must coordinate with their finance offices to keep monies active if contracts cross fiscal years.
7. Contract Close-out. AR 215-4, para. 6-32.

XI. SPECIAL CATEGORIES OF CONTRACTING

A. Concession Contracts. Generally. AR 215-4, ch. 7-1.

- 1. A concession contract is a license or permit for an activity/business to sell goods and services to authorized patrons at a designated location. Examples include retail merchandise, vending or amusement machines, special events, food service or instruction. May be for a long or short-term.
- 2. Before a concession contract is awarded, the garrison commander or general manager at an AFRC, ARMP, or designee, must determine that the requirement is normally a part of, and directly related to, the purpose of the MWR program as specified in AR 215-1 and must authorize, in writing, the MWR activity to operate a resale activity by concession contract.
- 3. The NAFI receives a flat fee or percentage of gross sales from the concessionaire.

4. Insurance. Contracting officer shall determine the types of insurance coverage necessary for the contractor to obtain to protect the interests of the NAFI. Coverage may include bodily injury and property damage; workmen's compensation; property insurance; automobile liability; etc. Contact FMWRC risk management office (RIMP) for assistance in determining appropriate amounts of insurance.
 - a. Amusement company contracts must include requirements for public liability insurance in the amounts specified by the contracting officer.
 - b. Certificates of insurance, in the types and amounts determined appropriate by the contracting officer must be provided to the contracting officer before beginning contract performance.

B. Long-Term Concession Contracts. AR 215-4, para. 7-2.

1. Over 30 days, even if days do not run consecutively (for example, every Sunday for one year).
2. Solicitation must put offerors on notice of:
 - a. Records that must be kept;
 - b. NAFI's right to audit and inspect records and premises;
 - c. Concessionaire must certify the integrity of its financial records;
 - d. The reports the concessionaire must provide;
 - e. Whether the concessionaire fee is a fixed fee or based on a percentage of sales;
 - f. The fact that prices must be clearly listed in English;

- g. Any service charges the NAFI will charge;
- 3. Competition may be based on pricing proposals, concession fee, or both.
- 4. If a service over \$2,500 is involved, the Service Contract Act may apply. AR 215-4, para. 7-2 and 7-9. See Ober United Travel Agency, Inc. v. Department of Labor, 135 F.3d 822 (D.C. Cir. 1998) (citing DOL provision that adopts contractor gross receipts under a concession contract as the contract “value”).

C. Short-Term Concession Contracts. AR 215-4, para. 7-5.

- 1. Performance for 30 days or less (regardless whether days are consecutive).
- 2. The contracting officer may format a standard short-term concessionaire contract (DA Form 5756) for a one-time legal sufficiency determination for repetitive short-term concession contracts.
- 3. Contract will include, at a minimum:
 - a. NAFI furnished supplies and services (space, water, etc);
 - b. Concessionaire furnished supplies and equipment (signage, displays, chairs, etc.);
 - c. Any limitations on performance or non-competition clauses;
 - d. Performance periods;
 - e. Concessionaire’s responsibility for site appearance and clean up;
 - f. Points of contact;

- g. Responsibility for obtaining licenses, passes, permits, and health and safety requirements;
- h. Mandatory clauses (termination, disputes, and audit).

D. Merchandise Concessions. AR 215-4, para. 7-3.

- 1. Prices for items should be included in contract.
- 2. In addition to requirements for concession contracts generally, additional requirements to be included in merchandise concession contract include:
 - a. Party responsible for purchasing supplies to be sold in shop;
 - b. Vandalism / theft reporting requirements;
 - c. Party responsible for equipment maintenance and utilities;
 - d. Procedures for clean up and disposition of unsold merchandise at conclusion of contract.

E. Vending and Amusement Machines (not including slot machines or other machines operated by the ARMP). AR 215-4, para 7-3.

- 1. In addition to general concession contract requirements, vending and amusement machine contracts must include:
 - a. The number of machines plus the machine type, manufacturer, and ID number;
 - b. Location of machines during contract performance;
 - c. Procedures for locking devices and sales accountability (see AR 215-1);

- d. Customer refund procedures;
 - e. Capability of coin counting machines to reject slugs;
 - f. Requirements for inspection and handling of food placed in vending machines;
 - g. Space, plumbing, electrical requirements available to the concessionaire.
 - 2. Randolph-Sheppard Act may apply. See AR 210-25 and 20 U.S.C 107, *et. seq.*)
- F. Consignment Agreements. Use DA form 5755, Consignment Agreement (Nonappropriated Funds). AR 215-4, para. 7-6.
- G. Entertainment Contracts. AR 215-4, para. 7-8.
- 1. AR 215-4 does not normally require competition for these contracts; however, it does prohibit the exclusive use of one entertainer or agent.
 - 2. Copyrighted material.
 - a. Clearances are required before copyrighted material can be performed on stage. Procedures for obtaining these clearances is contained in AR 215-1, para. 8-12.
 - b. Copyright and royalty clearances will be included in the contract file.

3. Government Employees. An entertainment contract will not be entered into between an MWR activity and a government employee or any organization substantially owned or controlled by one or more government employees unless the activity's needs can not otherwise reasonably be met. AR 215-1, para. 8-13a(6). But see AR 215-4, para. 1-26 for language generally permitting contracts with government employees.
 4. The SCA may apply if the entertainment requires the use of stage hands or other technicians.
 5. The contract must contain a cancellation clause and a liquidated damages clause. AR 215-4, para. 7-8d.
- H. Contracts with Amusement Companies and Traveling Shows. AR 215-4, para. 7-7.
- I. Service Contracts. AR 215-4, para. 7-9.
1. Contracts to perform an identifiable task, rather than furnish an end product. Examples include operation of NAFI equipment or facilities, instructions and training, sports officials, architect-engineer services (see AR 215-4, para. 8-2), housekeeping, grounds maintenance, repair of equipment, etc.
 2. Nonpersonal service contracts are those in which contractor personnel are not subject, whether by the contract terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government or the NAFI and its employees
 3. Personal services contracts are contracts that, by their express terms or by the manner of its administration, makes the contractor personnel appear to be NAFI or Government employees.
 4. Policy:

- a. Agencies should use performance based contracting methods to the maximum extent practicable for the acquisition of services except for: construction, architect-engineer services, utility services, and services that are incidental to supply purchases.
 - b. A NAFI shall not award a contract for the performance of an inherently governmental function (see AR 215-3).
 - c. Personal services contracts are generally prohibited. AR 215-4, para. 7-9d.
 - 5. The Service Contract Act (SCA).
 - a. 41 U.S.C 351-357 (1965). FAR 22.1007 and 22.1008.
 - b. The SCA is primarily for services performed by non-exempt service workers. The SCA provides for minimum wages and fringe benefits for service workers engaged in contracts valued over \$2,500. The contracting officer is responsible for incorporating wage determinations acquired from Department of Labor at www.dol.gov/esa/minwage/america.htm into the solicitation.
 - 6. Davis Bacon Act. 40 U.S.C 276a; FAR 22.403-1. Generally covers wages for construction contractor employees. However, certain services performed under construction contracts are still covered by the SCA. If construction contract is solely for services contract for dismantling, demolition, or removal of improvements without follow on construction, then the SCA applies. Otherwise the Davis-Bacon Act applies (federally funded construction projects over \$2000).
- J. Insurance Contracts. AR 215-4, para. 7-10.
- K. Information Technology Requirements. AR 215-4, para. 7-11.
- L. Construction and Architect-Engineer (A-E) Contracts. AR 215-4, ch. 8.

1. The process for awarding NAF construction and A-E service contracts is similar to that for the same type of APF contracts.
2. Performance and payment bonds are required for most construction projects. AR 215-4, para. 2-19.
3. Labor standards. The Davis-Bacon Act, the Copeland Act, and Contract Work Hours and Safety Standards Act apply to construction contracts that exceed \$2,000. AR 215-4, paras. 1-19 and 1-20. See DA Form 4075-R, dated August 1990.

M. Purchase of Alcoholic Beverages.

1. A NAFI in the United States may purchase beer and wine only from in-State sources. 10 U.S.C. § 2488. See AR 215-1, para. 10-6c; AR 215-4, para. 5-57. Cf. AR 215-1, para. 10-12a (Installation Management Agency (IMA) Regions set the policy governing the source of alcoholic beverages outside the United States).
2. Pricing of Wine. NAFIs located on military installations outside the United States must price and distribute wines produced in the United States equitably when compared with wines produced by the host nation. 10 U.S.C. § 2489. See AR 215-1, para. 10-13.

N. Commercial Sponsorship. AR 215-1, para. 11-6..

1. Definition. “Commercial sponsorship is the act of providing assistance, funding, goods, equipment (including fixed assets), or services to a MWR program(s) or event(s) by . . . [a sponsor] . . . for a specific (limited) period of time in return for public recognition or opportunities for advertising or other promotions.” AR 215-1, para. 11-6.
2. Procedures. Activities using commercial sponsorship procedures must ensure that:

- a. Obligations and entitlements of the sponsor and the MWR program are set forth in a written agreement that does not exceed one year, though such agreements may be renewed for a total of 5 years. All agreements require a legal review by the servicing legal office. AR 215-1, para. 11-8a;
- b. The activity disclaims endorsement of any supplier, product, or service in any public recognition or printed material developed for the sponsorship event. AR 215-1, para. 11-8d;
- c. The commercial sponsor certifies in writing that it shall not charge costs of the sponsorship to any part of the government. AR 215-1, para. 11-9c; and
- d. Officials responsible for contracting are not directly or indirectly involved with the solicitation of commercial vendors, except for those officials who administer NAF contracts. AR 215-1, para. 11-13a.

O. MWR Advertising. AR 215-1, para. 11-1.

XII. LABOR AND SOCIO-ECONOMIC POLICIES.

A. Socioeconomic Policies.

- 1. The Small Business Act (SBA). The SBA does not apply to NAF service contracts. However, contracting officers may solicit small businesses and minority firms to compete for NAF requirements. AR 215-4, para. 1-28.
- 2. Foreign acquisition. NAF contracting officers will comply with the following when acquiring foreign supplies and services, as applicable.
 - a. Buy American Act – Balance of Payments Program (41 U.S.C 10a-10d).

- b. DOD International Balance of Payments Program (DOD Directive 7060.3).
- c. The Trade Agreements Act of 1979 (19 U.S.C 2501, *et. seq.*).
- d. The Caribbean Basin Recovery Act (PL 98-67, Title II, as amended).
- e. Israeli Free Trade Implementation Act of 1985 (19 U.S.C 2112 note).
- f. The North American Free Trade Agreement Implementation Act of 1993 (19 U.S.C 3301, *et seq.*).

B. Labor laws. AR 215-4, para. 1-27,

- 1. NAF contracting officers shall comply with the following labor laws when acquiring supplies, services, and construction, as applicable.
 - a. Davis-Bacon Act (40 U.S.C 3141) – construction wages.
 - b. Copeland Act (18 U.S.C 874 and 40 U.S.C 3145) – construction – anti-kickback.
 - c. Walsh-Healey Public Contracts Act (41 U.S.C 35-45, FAR 22.602) – all contracts over \$10,000 – wages and working conditions.
 - d. Equal Employment Opportunity. Executive Order 11246, as amended, FAR 22.807).
 - e. Service Contract Act of 1965 (41 U.S.C 351; FAR 22-1007 and 22-1008). Minimum wage in service contracts.
 - f. Contract Work Hours and Safety Standards Act (40 U.S.C 3701, *et. seq.*).

XIII. LEGAL REVIEW

- A. Legal counsel should review NAF contracting actions in all cases required by regulation and in any other cases when requested by the NAF contracting officer.

- B. Required legal reviews. New to the current regulation. AR 215-4, para. 1-22.
 - 1. Proposed awards resulting from unsolicited proposals.
 - 2. Decisions concerning claims, disputes, protests, and appeals.
 - 3. Novations, change of name agreements, and assignment of claims.
 - 4. Termination actions.
 - 5. Recommendations for suspension or debarment.
 - 6. Requests for release of information under the FOIA.
 - 7. Ratification actions. (AR 215-4, para. 1-21).
 - 8. Congressional inquiries related to NAF acquisitions.
 - 9. Joint Ethics Regulation / Fraud violations.
 - 10. Proposed contractual documents related to the purchase or sale of real estate.
 - 11. Questions regarding NAF tax status.
 - 12. Labor irregularities.
 - 13. Show cause and cure notices.
 - 14. Determinations of personal / nonpersonal services.
 - 15. Decisions concerning late proposals.
 - 16. Determinations of nonresponsiveness or nonresponsible offerors.
 - 17. Prior to initial use, standard form BPAs, BOAs, consignment, and concessionaire contracts.
 - 18. Any time an alternate contract form is used.
 - 19. All revenue generating contracts not covered in 17 above.

20. Solicitations and contracts in excess of the simplified acquisition threshold.
 21. Awards incorporating contractor terms or conditions.
 22. Indefinite delivery solicitations and contracts with aggregate orders expected to exceed \$100,000.
 23. Tech data issues.
 24. Bankruptcy proceedings related to a contractor.
 25. Contracts with Government employees and military personnel.
 26. Questions concerning EEO exemptions.
 27. Potential contractor conflicts of interest.
 28. Delivery or task orders above \$500,000.
- C. Legal review will, in writing, state whether a proposed action is legally sufficient and will recommend a course of action to overcome any deficiencies. If action is legally sufficient but contains other deficiencies, those should be addressed separately from the legal sufficiency decision.

XIV. LITIGATION INVOLVING NAF CONTRACTS.

- A. Protests. AR 215-4, para. 4-21.
1. GAO Jurisdiction.
 - a. NAFI procurements. The GAO lacks jurisdiction over procurements conducted by NAFIs because its authority extends only to “federal agency” acquisitions. See 31 U.S.C. § 3551; 4 C.F.R. § 21.5(g) (GAO bid protest rule implementing statute). A NAFI is not a “federal agency.” See DSV, GmbH, B-253724, June 16, 1993, 93-1 CPD ¶ 468; Matter of: LDDS Worldcom, B-270109, February 6, 1996, 96-1 CPD ¶ 45. Protests are resolved under AR 215-4, para. 4-21.

- b. Procurements conducted by an APF contracting officer are usually subject to GAO jurisdiction. The GAO has jurisdiction over procurements conducted “by or for a federal agency,” regardless of the source of funds involved. Barbarosa Reiseservice GmbH, B-225641, May 20, 1987, 87-1 CPD ¶ 529.
 - (1) APF activities may provide “in-kind” support to NAFIs. Any APF contracting in support of NAFIs is subject to the Competition in Contracting Act.
 - (2) Per DOD policy, activities may provide APFs directly to NAFIs in support of MWR programs. Memorandum, Assistant Secretary of Defense, subject: DOD Morale, Welfare and Recreation Utilization, Support and Accountability (DOD MWR USA) Practice (23 July 1997).
 - c. The GAO may consider a protest involving a NAFI if it is alleged that an agency is using a NAFI to avoid competition requirements. Premier Vending, B-256560, July 5, 1994, 94-2 CPD ¶ 8; LDDS Worldcom, B-270109, Feb. 6, 1996, 96-1 CPD ¶ 45 (no evidence Exchange was acting as a conduit for Navy or Navy participation was pervasive).
 - d. The GAO will consider a protest involving a NAFI-conducted procurement if there is evidence of pervasive involvement of federal agency personnel in the procurement and the NAFI is acting merely as a conduit for the federal agency. See Thayer Gate Dev. Corp., B-242847.2, Dec. 9, 1994 (unpub.) (involvement of high ranking Army officials in project did not convert procurement by a NAFI to one conducted by the Army).
2. In MCI Telecommunications Corp. v. Army & Air Force Exchange Serv., No. 95-0607, 1995 U.S. Dist. LEXIS 12947 (D.D.C. May 9, 1995) (mem.), the court found no Scanwell standing in a suit against AAFES. But see 28 U.S.C. § 1491(b) (1) (granting pre-award and post-award protest jurisdiction to the Court of Federal Claims (COFC) and the district courts per amendment to the Tucker Act by the Administrative Disputes Resolution Act of 1996. This amendment, however, does not expressly include protests of exchange service contracting actions). Compare COFC claims jurisdiction at 28 U.S.C. § 1491(a)(1).

B. Disputes. AR 215-4, paras. 6-11 through 6-13.

1. The requirement for a final decision.
 - a. If the contracting officer fails to resolve a dispute arising under or relating to the contract, the contracting officer issues a final decision per the disputes clause contained in the NAF contract. AR 215-4, para. 6-11.
 - b. The contracting officer's decision lacks finality if it advises the contractor of its appeal rights under the contract incorrectly and the contractor is prejudiced by the deficiency. Decker & Co. v. West, 76 F.3d 1573 (Fed. Cir. 1996); Wolverine Supply, Inc., ASBCA No. 39250, 90-2 BCA ¶ 22,706.
2. No judicial forum has jurisdiction over NAFI contract disputes, except those disputes arising under contracts involving the exchange services. As instrumentalities of the United States, NAFIs are immune from suit. Congress has not waived immunity for NAFIs under the Tucker Act (28 U.S.C. § 1346(a)(2)), the Contract Disputes Act (41 U.S.C. § 602(a)), or the Administrative Procedures Act. See Furash & Co. V. United States, 46 Fed. Cl. 518 (2000); Swiff-Train Co. v. United States, 443 F.2d 1140 (5th Cir. 1971); Commercial Offset Printers, Inc., ASBCA No. 25302, 81-1 BCA ¶ 14,900. AINS, Inc. v. United States, 365 F.3d 1333 (Fed. Cir.) 2003 (CAFC established a **four part test** for its determination of whether a government instrumentality is a NAFI: i) it does not receive its monies by congressional appropriation; ii) it derives its funding primarily from its own activities, services, and product sales; iii) absent a statutory amendment, there is no situation in which appropriated funds could be used to fund the federal entity; and iv) there is a clear expression by Congress that the agency was to be separated from general federal revenues.)
 - a. Exception. Express or implied-in-fact contracts entered into by DOD, Coast Guard, and NASA exchange services, although NAFIs, are contracts of the United States for purposes of determining jurisdiction under the Tucker Act and the Contract Disputes Act. 28 U.S.C. § 1491(a)(1).

- b. The Court of Appeals for the Federal Circuit (CAFC) held that the COFC has jurisdiction over a contract dispute with the Navy Resale and Services Support Office (NAVRESSO) even though it is a NAFI and the Tucker Act does not explicitly waive sovereign immunity for NAFIs. McDonald's Corp. v. United States, 926 F.2d 1126 (Fed. Cir. 1991).
3. The Armed Services Board of Contract Appeals (ASBCA) has jurisdiction over NAF contract disputes if:
 - a. The contract incorporates a disputes clause that grants such jurisdiction. COVCO Hawaii Corp., ASBCA No. 26901, 83-2 BCA ¶ 16,554.
 - b. The contract contains no disputes clause, but DOD regulations require incorporation of a jurisdiction-granting clause in the NAF contract. Recreational Enters., ASBCA No. 32176, 87-1 BCA ¶ 19,675.
 - c. The contractor seeks non-monetary, declaratory judgment. See SUFI Network Services, Inc., ASBCA No. 54503, 04-01 BCA ¶ 32,606.
4. The CAFC has refused to hear appeals from decisions of the ASBCA concerning NAFI contracts. Strand Hunt Constr., Inc. v. West, 111 F.3d 142 (Fed. Cir. 1997) (unpub); Maitland Bros. v. Widnall, 41 F.3d 1521 (Fed. Cir. 1994) (unpub).
5. The ASBCA has refused to read the Protest After Award clause into a NAF contract awarded by an APF contracting officer, even though the clause was required by regulation. F2M, Inc., ASBCA No. 49719, 97-2 BCA ¶ 28,982.

XV. CONCLUSION.

APPENDIX A

Title 10, Section 3013 (2005)

§ 3013. Secretary of the Army

(a)

(1) There is a Secretary of the Army, appointed from civilian life by the President, by and with the advice and consent of the Senate. The Secretary is the head of the Department of the Army.

(2) A person may not be appointed as Secretary of the Army within five years after relief from active duty as a commissioned officer of a regular component of an armed force.

(b) Subject to the authority, direction, and control of the Secretary of Defense and subject to the provisions of chapter 6 of this title [[10 U.S.C.S §§ 161](#) et seq.], the **Secretary of the Army is responsible for, and has the authority necessary to conduct, all affairs of the Department of the Army, including the following functions:**

- (1) Recruiting.
- (2) Organizing.
- (3) Supplying.
- (4) Equipping (including research and development).
- (5) Training.
- (6) Servicing.
- (7) Mobilizing.
- (8) Demobilizing.
- (9) Administering (including the morale and welfare of personnel).**

(10) Maintaining.

(11) The construction, outfitting, and repair of military equipment.

(12) The construction, maintenance, and repair of buildings, structures, and utilities and the acquisition of real property and interests in real property necessary to carry out the responsibilities specified in this section.

(c) Subject to the authority, direction, and control of the Secretary of Defense, the Secretary of the Army is also responsible to the Secretary of Defense for--

- (1) the functioning and efficiency of the Department of the Army;
- (2) the formulation of policies and programs by the Department of the Army that are fully consistent with national security objectives and policies established by the President or the Secretary of Defense;
- (3) the effective and timely implementation of policy, program, and budget decisions and instructions of the President or the Secretary of Defense relating to the functions of the Department of the Army;
- (4) carrying out the functions of the Department of the Army so as to fulfill the current and future operational requirements of the unified and specified combatant commands;
- (5) effective cooperation and coordination between the Department of the Army and the other military departments and agencies of the Department of Defense to provide for more effective,

efficient, and economical administration and to eliminate duplication;

(6) the presentation and justification of the positions of the Department of the Army on the plans, programs, and policies of the Department of Defense; and

(7) the effective supervision and control of the intelligence activities of the Department of the Army.

(d) The Secretary of the Army is also responsible for such other activities as may be prescribed by law or by the President or Secretary of Defense.

(e) After first informing the Secretary of Defense, the Secretary of the Army may make such recommendations to Congress relating to the Department of Defense as he considers appropriate.

(f) The Secretary of the Army may assign such of his functions, powers, and duties as he considers appropriate to the Under Secretary of the Army and to the Assistant Secretaries of the Army. Officers of the Army shall, as directed by the Secretary, report on any matter to the Secretary, the Under Secretary, or any Assistant Secretary.

(g) The Secretary of the Army may--

(1) assign, detail, and prescribe the duties of members of the Army and civilian personnel of the Department of the Army;

(2) change the title of any officer or activity of the Department of the Army not prescribed by law; and

(3) prescribe regulations to carry out his functions, powers, and duties under this title [[10 U.S.C.S §§ 101](#) et seq.].

Title 10, Section 2783
Nonappropriated Fund Instrumentalities: Financial Management
and Use of Nonappropriated Funds

(a) **REGULATION OF MANAGEMENT AND USE OF NONAPPROPRIATED FUNDS.**—The Secretary of Defense shall prescribe regulations governing—

- (1) the purposes for which nonappropriated funds of a nonappropriated fund instrumentality of the United States within the Department of Defense may be expended; and
- (2) the financial management of such funds to prevent waste, loss, or unauthorized use.

(b) **PENALTIES FOR VIOLATIONS.**—

- (1) A civilian employee of the Department of Defense who is paid from nonappropriated funds and who commits a substantial violation of the regulations prescribed under subsection (a) shall be subject to the same penalties as are provided by law for misuse of appropriations by a civilian employee of the Department of Defense paid from appropriated funds. The Secretary of Defense shall prescribe regulations to carry out this paragraph.
- (2) The Secretary shall provide in regulations that a violation of the regulations prescribed under subsection (a) by a person subject to chapter 47 of title 10, United States Code (the Uniform Code of Military Justice), is punishable as a violation of section 892 of such title (article 92) of the Uniform Code of Military Justice).

(c) **NOTIFICATION OF VIOLATIONS.**—

- (1) A civilian employee of the Department of Defense (whether paid from nonappropriated funds or from appropriated funds), and a member of the Armed Forces , whose duties include the obligation of nonappropriated funds, shall notify the Secretary of Defense of information which the person reasonably believes evidences—
 - (A) a violation by another person of any law, rule, or regulation regarding the management of such funds; or
 - (B) other mismanagement or gross waste of such funds.
- (2) The Secretary of Defense shall designate civilian employees to receive a notification described in paragraph (1) and ensure the prompt investigation of the validity of information provided in the notification.
- (3) The Secretary shall prescribe regulations to protect the confidentiality of a person making a notification under paragraph (1).